

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Bradford Stoner, :
Relator, :
v. : No. 14AP-651
The Industrial Commission of Ohio and : (REGULAR CALENDAR)
Red Head Brass Inc., :
Respondents. :
:

D E C I S I O N

Rendered on June 25, 2015

M. Blake Stone, L.P.A., Inc., and M. Blake Stone, for relator.

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

*Critchfield, Critchfield & Johnston, Ltd., and Susan E.
Baker, for respondent Red Head Brass Inc.*

IN MANDAMUS

SADLER, J.

{¶ 1} Relator, Bradford Stoner, commenced this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order finding that he is entitled to a schedule loss award under R.C. 4123.57(B) for one-third loss of his right index finger at the DIP joint and ordering the commission to find that he is entitled to a total loss of use of his right index finger "due to an injury at the PIP joint and ankylosis at the DIP joint which caused him to lose more than 2/3 of the right index finger." (Relator's Complaint for Writ of Mandamus, 5.)

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who considered the action on its merits and issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate determined that the commission had not abused its discretion in finding "relator did not meet his burden of proving that he had sustained more than two-thirds loss of use of his right index finger and, as such, * * * did not qualify for a total loss of use of his right index finger." (Magistrate's Decision, 11.) Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} No objections have been filed to the magistrate's decision. Under Civ.R. 53(D)(4)(c), "[i]f no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision."

{¶ 4} Reviewing the face of the decision, the magistrate relied on this court's decision in *State ex rel. Varney v. Indus. Comm.*, 10th Dist. No. 11AP-585, 2012-Ohio-4904. In *Varney*, the relator applied for a total loss of use award due to stiffness, numbness, and sensitivity to cold in several of his previously amputated and reattached fingers. Our court held by a vote of two to one that, for claims involving the total loss of use of fingers, "R.C. 4123.57(B) requires the commission to determine whether more than two-thirds of a finger is useless and not merely whether the finger is totally useless." *Id.* at 4.

{¶ 5} After the relator here filed his claim for a writ of mandamus, *Varney* was reversed by the Supreme Court of Ohio in *State ex rel. Varney v. Indus. Comm.*, ___ Ohio St.3d ___, 2014-Ohio-5510. The Supreme Court found that R.C. 4123.57 does not require a finding of total loss of use based on a two-thirds threshold. *Id.* at ¶ 22. Rather, the Supreme Court held that in such cases the proper standard is whether, for all practical purposes, the claimant has lost all use of the affected member, as evidenced by a physician's opinion on impairment and extent of loss. *Id.* at ¶ 24. Further, the Supreme Court found that the commission did not abuse its discretion in relying on a physician report, which opined that relator retained some functional use of the affected finger, as evidence to support its decision to deny relator compensation for the total loss of use of his fingers. *Id.*

{¶ 6} The Supreme Court distinguished the facts of *Varney* from previous cases where ankylosis, total stiffness which makes the affected digit useless, is proven. *Id.* at ¶ 19, 22-23. According to the Supreme Court, "[o]nly when the loss is specific to particular bones or phalanges does the statute provide that the loss may equate to a total loss: 'The loss of more than the middle and distal phalanges of any finger is considered equal to the loss of the whole finger.' " *Id.* at ¶ 22, quoting R.C. 4123.57.

{¶ 7} We therefore modify the legal basis of the magistrate's decision to that articulated in *Varney*, 2014-Ohio-5510. Further, we find that applying the standard articulated in *Varney*, 2014-Ohio-5510, to the same evidence considered by the magistrate, to which relator did not object, we agree that the commission did not abuse its discretion to deny compensation for the total loss of use of the finger. Accordingly, we find no error of law or other defect evident from the face of the magistrate's decision.

{¶ 8} Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law as modified herein. In accordance with the magistrate's decision, the requested writ of mandamus is denied.

Writ of mandamus denied.

BROWN, P.J., and LUPER SCHUSTER, J., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Bradford Stoner,	:	
Relator,	:	
v.	:	No. 14AP-651
The Industrial Commission of Ohio and Red Head Brass Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on February 25, 2015

M. Blake Stone, L.P.A., Inc., and M. Blake Stone, for relator.

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

*Critchfield, Critchfield & Johnston, Ltd., and Susan E.
Baker, for respondent Red Head Brass Inc.*

IN MANDAMUS

{¶ 9} Relator, Bradford W. Stoner, 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 finding that he is entitled to a schedule loss award under R.C. 4123.57(B) for one-third loss of his right index finger, and ordering the commission to find that he is entitled to a total loss of use of his right index finger.

Findings of Fact:

{¶ 10} 1. Relator sustained a work-related injury on October 19, 2011 when, during set-up operations, the Allen wrench he was using to make adjustments slipped and he injured his right hand.

{¶ 11} 2. Relator's workers' compensation claim was originally allowed for the following conditions:

Fx Distal Phal, Hand-Opn	Right	Second Finger
Open Wnd Finger w Tendon	Right	Second Finger
Injury Digital Nerve	Right	
Open Wound Of Finger	Right	Third Finger

{¶ 12} 3. In an order mailed November 17, 2011, the Ohio Bureau of Workers' Compensation ("BWC") awarded relator temporary total disability ("TTD") compensation beginning October 20, 2011.

{¶ 13} 4. Relator's treating physician James A. Slaby, M.D., noted as follows in his November 26, 2012 office note one month prior to a surgery he would perform:

He no longer goes to OT, and he states he continues his exercises at home.

He presents with persistent stiffness in his right index finger at the DIP joint. The patient states his pain in the finger is manageable most of the time. He is doing ok at work. He has noticed some increasing tethering of the scar tissue on the ulnar aspect. The tethering is hindering him at times with activities of daily living.

Sometimes he wakes up at night because of the discomfort in his index finger. He states this occurs a few times per week.

He has decided to proceed with the surgery to release this tethered scar tissue on his right index finger.

{¶ 14} 5. On December 20, 2012, Dr. Slaby performed the following surgery:

Excision of painful scar tethering contracture, ulnar aspect right index finger with multiple (4) Z-plasty reconstruction.

{¶ 15} 6. By all accounts, the surgery went well as evidenced by the following office notes from relator's post-operative visits with Dr. Slaby:

(a) [January 18, 2013]

Postop [sic] visit from his recent surgery on 12/20/12 where he underwent excision of painful scar tethering contracture ulnar aspect right index finger with multiple (4) Z-plasty reconstruction.

Comes in today with no complaints.

The incisions are intact. The flaps are healing satisfactory.

The sore is softening. The contracture has resolved.

Swelling resolved.

Massage the incisions with skin lotion daily to help soften up the scars.

Continue range of motion exercises to his PIP joint to minimize stiffness.

Return to work is 2/2/13 and is tentative.

Followup [sic] 2 weeks.

(b) [February 1, 2013]

Comes in today with no complaints. * * * Has good range of motion to his PIP joint.

Return to work is 2/4/13.

Followup [sic] one month.

(c) [March 1, 2013]

Comes in today with no complaints. * * * Has good range of motion to his PIP joint.

Patient is back to work and is doing ok. He is having no trouble using his right hand.

Followup [sic] one month.

(d) [April 5, 2013]

He comes in today with no complaints. The incisions are well healed. He is back to work without difficulty. He is having no problems at work at this time. He is showing good flexion at the MP joint and the PIP joint of the index finger. The DIP joint is still showing some stiffness. I told the patient that will [this] will be more of a permanent stiffness because of the involvement of the joint itself with the injury. The stiffness in the DIP joint does not seem to bother him during his activities of daily living. He is still able to grip things and has reasonable grip strength. He will massage the incision with skin lotion on a daily basis to help soften up the scar. He will follow up to see me on an as needed basis.

{¶ 16} 7. An independent medical evaluation was performed by Robert L. Kleinman, M.D. In his November 5, 2013 report, Dr. Kleinman noted the following physical findings and assessed his opinion as to the percentage of impairment:

DIP Extension to	0 degrees
Dip Flexion to	0 degrees
Total DIP	36% Digit

PIP Extension to	10 degrees
Pip Flexion to	90 degrees
Total PIP	9% Digit

MP Extension to	+20 degrees
MP Flexion to	90 degrees
Total MP	0% Digit

Total impairment equals (0%+9%+36%) 42% Digit

{¶ 17} 8. On November 21, 2013, relator filed a C-86 motion requesting a loss of use based on Dr. Kleinman's assessment concerning his PIP joint:

[This] claim has been allowed for 816.12 Fx Distal Phal, Right 2nd Finger; 883.0 Open Wound, Right 3rd Finger
883.2 Open Wound, Right 2nd Finger; 955.6 Injury Digital Nerve, Right; 718.44
Contracture Deformity of Index Finger, Right

It is requested that the claim be further allowed for a total loss of the right index PIP joint due to ankylosis which entitles him to a 1/3 loss of the index finger or 11 and 2/3 weeks of benefits at the rate of \$783.00 week which equals \$9135.00.

{¶ 18} 9. On November 27, 2013, Dr. Slaby signed a loss of use diagram noting that relator had a stiff DIP joint and specifically circling on the diagram the DIP joint of relator's right index finger.

{¶ 19} 10. An independent medical evaluation was performed by Paul T. Scheatzle, D.O. In his January 10, 2014 report, Dr. Scheatzle noted the following range of motion findings concerning relator's right index finger: MP extension -10 degrees; MP flexion 90 degrees; PIP extension -20 degrees; PIP flexion 90 degrees; DIP extension -10 degrees. Dr. Scheatzle noted that relator's pinch strength was markedly diminished in

his right hand with an inability to move the DIP joint of the index finger and that, in his medical opinion, relator had "loss of range of motion and partial loss of sensation results in 85% digit impairment. For all practical purposes, this is a total permanent loss of use of the PIP joint of the index finger as it is not capable of performing most of the functions which it performs as a result of the allowed injury."

{¶ 20} 11. Relator's counsel sought to amend the November 21, 2013 motion in a memo dated January 23, 2014, stating:

I wish to amend the motion I filed 11-21-2013. I wish to ask for the entire loss of use of the right index finger, not a 1/3 loss of use. This entitles my client to 36 weeks of compensation at the rate of \$783.00/week which equals \$28,188.00, I [sic] not \$9135.00.

My amended motion is based on the 1-8-14 [sic] report of Dr. Scheatzle, the 10-29-13 [sic] report of Dr. Kleinman, the 4-5-13 Office note of Dr. Slaby and Memo F3 of the hearing officer's manu[a]l. The award should start on 4-5-13 and go for 36 weeks until it is paid out.

{¶ 21} 12. In an order mailed January 24, 2014, the BWC additionally allowed relator's claim for "total loss of PIP joint due to ankylosis right finger 02," based on the medical report of Dr. Scheatzle.

{¶ 22} 13. An independent medical evaluation was performed by Dennis A. Glazer, M.D. In his March 7, 2014 report, Dr. Glazer noted the following findings upon physical examination:

Examination of the right index finger on the right hand shows that he has no motion in the DIP joint. He holds the finger out straight, and it does not bend. It is held at full extension. With regard to the PIP joint, he has approximately 3 degrees of flexion contracture but can bend completely to 90 degrees of flexion. The index finger has decreased sensation on the ulnar side at the PIP level and less loss of sensation on the radial side. On flexion and making a fist, he can bend so that the index finger is approximately 2 cm from the palm. He is able to have a strong pinch end to side and end to end pinch with the thumb and the index finger. He can make a composite fist, although the index finger sticks out, it does not reach completely.

{¶ 23} Dr. Glazer opined:

It is my opinion, within reasonable medical probability, that based on my examination and review of the records, the claimant did not suffer total loss of his index finger. Although he has no range of the distal interphalangeal joint, his middle phalanx at the proximal interphalangeal joint extends almost fully and flexes to 90 degrees. The physical findings do not rise to the level of ankylosis or contracture of the distal and middle phalanges.

{¶ 24} 14. On March 27, 2014, relator's counsel again asked to amend the motion in a memo stating:

I wish to make a 2nd amendment to the motion I filed 11-21-2013.

I still wish to ask for the entire loss of use of the right index finger, not a 1/3 loss of use based on the presently allowed conditions. * * *

I do want to amend 11-21-13 motion to request the allowance of this claim for ankylosis of the right 2nd finger (index finger) DIP joint only.

{¶ 25} 15. Timothy L. Hirst, M.D., examined relator and, in his April 9, 2014 report, Dr. Hirst noted:

He had no therapy after the 2nd surgery to release the scar on his index finger on his right hand. The claimant is getting no treatment now. The claimant is working now. He is doing his regular job. He operates a thread mill. He has had no other injuries, and he has been on this job for 10 years.

{¶ 26} Dr. Hirst provided the following relevant findings upon physical examination:

The ROM of the right Index finger shows a DIP Joint Flexion of 0 degrees and DIP Extension of 0 degrees, a PIP Joint Flexion of 82 degrees and PIP Extension of (-14) degrees, an MP Joint Flexion of 72 degrees, and an MP Joint Extension of 0 degrees.

{¶ 27} Dr. Hirst repeatedly stated that there was a total loss of use of the right index finger from the DIP joint and distally.

{¶ 28} 16. Relator's amended motion was heard before a district hearing officer ("DHO") on April 16, 2014. The DHO determined that relator's claim should be additionally allowed for "ankylosis of the DIP joint right index finger" and that relator had failed to establish that he sustained a schedule loss of use of his right index finger.

{¶ 29} 17. Dr. Hirst responded to a medical questionnaire on May 27, 2014. Dr. Hirst responded yes to the question:

Has the ankylosis of the DIP joint of the right index finger and the damage to the PIP joint of the right index finger caused the Injured Worker to totally lose [sic] more than 2/3 of the use of the right index finger? If yes, is this within a reasonable degree of medical probability?

{¶ 30} 18. Relator's appeal was heard before a staff hearing officer ("SHO") on June 4, 2014. The SHO vacated the prior DHO order and made the following findings: (1) relator's claim should be additionally allowed for "ankylosis, right index DIP joint" and (2) relator was entitled to one-third loss of use award for ankylosis of the DIP joint right index finger. With regard to relator's request that he be granted a schedule loss of use award for the entire right index finger, the SHO concluded that request should be denied specifically finding that there was an "unresolved discrepancy in the records concerning the impairment of the Injured Worker's right index finger at the PIP joint."

{¶ 31} The SHO concluded:

The Staff Hearing Officer has relied upon the 11/05/2013 report of Dr. Kleinman, the 03/07/2014 report of Dr. Glazer and the available records from Dr. Slaby, the treating physician, in finding that the Injured Worker has failed to establish that he has sustained a total loss of use of the right index finger due to an injury at the PIP joint. Dr. Slaby was the only treating physician. The Staff Hearing Officer further finds that Dr. Slaby's records address a total loss of the DIP joint and do not establish a loss of the entire index finger due to the injury at the PIP joint.

Further, there were alternative arguments by Injured Worker's counsel regarding Industrial Commission Hearing Officer Policy Statement and Guideline F3. However, the Staff Hearing Officer finds that this guideline does not apply in this instance as there is no medical evidence that the PIP joint is ankylosed.

{¶ 32} 19. Relator's further appeal was refused by order of the commission mailed June 26, 2014.

{¶ 33} 20. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 34} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶ 35} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 36} 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.*, 11 Ohio St.2d 141 (1967). 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.*, 26 Ohio St.3d 76 (1986). 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.*, 29 Ohio St.3d 56 (1987). 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.*, 68 Ohio St.2d 165 (1981).

{¶ 37} R.C. 4123.57(B) provides awards of permanent partial disability compensation for specific schedule losses due to industrial injuries. For these purposes, R.C. 4123.57(B) provides as follows:

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 be paid in installments according to the following schedule:

* * *

For the loss of a second finger, commonly called index finger, thirty-five weeks.

* * *

The loss of the third, or distal, phalange of any finger is considered equal to the loss of one-third of the finger.

The loss of the middle, or second, phalange of any finger is considered equal to the loss of two-thirds of the finger.

The loss of more than the middle and distal phalanges of any finger is considered equal to the loss of the whole finger. In no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

* * *

For ankylosis (total stiffness of) or contractures (due to scars or injuries) which makes any of the fingers, thumbs, or parts of either useless, the same number of weeks apply to the members or parts thereof as given for the loss thereof.

{¶ 38} In the present case, the commission determined that relator did establish that he had sustained a one-third loss of use of his right index finger based upon the medical reports which demonstrated that he had no range of motion at the DIP joint. This is not disputed. However, relator argues that the medical evidence that he submitted demonstrated that, although his PIP joint was not ankylosed, he had sustained enough damage that the commission should have found that he had sustained more than two-thirds loss of his finger. For the reasons that follow, the magistrate disagrees.

{¶ 39} At the outset, relator acknowledges that the medical evidence does not establish that the PIP joint of his right index finger is ankylosed. Ankylosis is defined as immobility of a joint. *Taber's Cyclopedic Dictionary* 125 (20th Ed.2005). Relator's DIP joint is ankylosed, but his PIP joint is not. Despite acknowledging that his PIP joint is not ankylosed, relator nevertheless contends that joint is damaged enough to warrant a finding of more than two-thirds loss of use.

{¶ 40} Relator's argument relies on this court's decision in *State ex rel. Varney v. Indus. Comm.*, 10th Dist. No. 11AP-585, 2012-Ohio-4904, ¶ 4, wherein this court stated that, when determining whether or not an injured worker is entitled to a total loss of use of a finger, R.C. 4123.57(B) requires the commission determine whether more than two-thirds of a finger is useless and not merely whether the finger is totally useless. In making this argument, relator argues that the report of Dr. Scheatzle clearly supports the conclusion that he has sustained more than two-thirds loss of use of his right index finger.

{¶ 41} In his report, Dr. Scheatzle opined that relator's "loss of range of motion and partial loss of sensation results in 85% digit impairment. For all practical purposes, this is a total permanent loss of use of the PIP joint of the index finger as it is not capable of performing most of the functions which it performs as a result of the allowed injury." However, as the SHO determined, Dr. Scheatzle's opinion differed significantly from the opinions of Drs. Kleinman and Glazer. All three doctors found that relator had 90 degrees of flexion at the PIP joint. Dr. Kleinman found 10 degrees of extension while Dr. Scheatzle found -20 degrees of extension and Dr. Glazer opined that relator had approximately 3 degrees of flexion contracture (meaning the PIP joint could not be extended to 0 degrees). Because Dr. Scheatzle's report differed significantly from the reports of Drs. Kleinman and Glazer and because Dr. Hirst indicated that Dr. Scheatzle made an error in his report, the SHO removed the report of Dr. Scheatzle from evidentiary consideration. As such, to the extent that relator relies exclusively on the report of Dr. Scheatzle to support his argument that he is entitled to a total loss of use of his right index finger, relator's argument fails because Dr. Scheatzle's report was removed from evidentiary consideration and relator has not presented a reasonable argument why this court should find the removal of that report was an abuse of discretion.

{¶ 42} Relator asserts further that, upon finding that he did not have ankylosis of the PIP joint, none of the doctors discussed whether or not, despite a lack of ankylosis, there was sufficient damage to the PIP joint to award him more than two-thirds loss of use. For the reasons that follow, the magistrate disagrees with relator's argument.

{¶ 43} Dr. Kleinman opined the impairment to relator's right index finger was 42 percent. This is less than two-thirds and would not support relator's argument. Dr. Glazer noted that relator was able to make a composite fist despite the fact that his index finger did not completely reach the palm of his hand. Dr. Glazer also noted that relator had a strong pinch end to side and end to end pinch with the thumb and index finger. The office notes and the hand diagram of Dr. Slaby indicate that relator was back to work and was not having any problems, and, although the DIP joint still showed signs of stiffness, the stiffness did not bother him during his activities of daily living and he was able to grip things and has reasonable grip strength.

{¶ 44} Based on the medical evidence, the commission found that relator did not meet his burden of proving that he had sustained more than two-thirds loss of use of his right index finger and, as such, the commission concluded that he did not qualify for a total loss of use of his right index finger. Because the medical evidence established that he had no range of motion of the DIP joint, the commission awarded him a one-third loss of use award and that determination is supported by some evidence in the record.

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

/S/ MAGISTRATE
STEPHANIE BISCA

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).