

TENTH APPELLATE DISTRICT

The State of Ohio, ex rel.	:	
Ford Motor Company,	:	
	:	
Relator,	:	No. 12AP-659
	:	
v.	:	(REGULAR CALENDAR)
	:	
The Industrial Commission of	:	
Ohio and Anthony Ganelli,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on June 4, 2013

Timothy J. Krantz, for relator.

Michael DeWine, Attorney General, and *Lydia M. Arko*, for
respondent Industrial Commission of Ohio.

Bashein & Bashein Co., L.P.A., and *Thomas J. Sheehan*;
Paul W. Flowers Co., L.P.A., and *Paul W. Flowers*, for
respondent Anthony Ganelli.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶ 1} Relator, Ford Motor Company ("Ford"), 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 that awarded respondent, Anthony Ganelli ("claimant"), \$4,000 for facial disfigurement under R.C. 4123.57(B), and ordering the commission to find that claimant is not entitled to that award.

{¶ 2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, which included findings of fact and conclusions of law, and recommended that this court grant Ford's request for a writ of mandamus. Claimant has filed objections to the magistrate's decision. Ford has filed a motion to strike claimant's objections to the magistrate's decision.

{¶ 3} With regard to Ford's motion to strike claimant's objections, Ford argues that claimant filed his objections untimely. We agree. The magistrate's decision was rendered on February 14, 2013. Pursuant to Civ.R. 53(D)(3)(b), claimant was required to file his objections within 14 days of the magistrate's decision, which would have been February 28, 2013. Claimant did not file his objections until March 14, 2013. Claimant contends that he was permitted to file his objections on March 14, 2013 pursuant to our order granting the commission an extension of time to file its objections until March 14, 2013. However, our order granted only the commission an extension of time to file its own objections. The commission's motion for an extension of time did not request an extension for claimant's objections and was not joined by claimant. Furthermore, Ford never consented to an extension of time for claimant. For these reasons, we grant Ford's motion to strike claimant's objections.

{¶ 4} Accordingly, Ford's motion to strike claimant's objections is granted. After an examination of the magistrate's decision and an independent review of the record, pursuant to Civ.R. 53, we adopt the magistrate's findings of fact and conclusions of law. Ford's writ of mandamus is granted in part, and the matter is remanded to the commission.

*Motion to strike granted;
writ of mandamus granted in part;
cause remanded.*

SADLER and DORRIAN, JJ, concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio, ex rel. Ford Motor Company,	:	
	:	
Relator,	:	No. 12AP-659
v.	:	
	:	(REGULAR CALENDAR)
The Industrial Commission of Ohio and Anthony Ganelli,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on February 14, 2013

Timothy J. Krantz, for relator.

Michael DeWine, Attorney General, and *Lydia M. Arko*, for
respondent Industrial Commission of Ohio.

Paul W. Flowers Co., L.P.A., and *Paul W. Flowers*, for
respondent Anthony Ganelli.

IN MANDAMUS

{¶ 5} Relator, Ford Motor Company, 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 awarded respondent Anthony Ganelli ("claimant") \$4,000 for facial disfigurement under R.C. 4123.57(B), and ordering the commission to find that claimant is not entitled to that award.

Findings of Fact:

{¶ 6} 1. On October 10, 2008, claimant sustained a work-related injury while breaking up a fitting on a hydraulic press. Apparently, the brake cycled and a piece of fitting broke off causing a laceration to claimant's right lower face and jaw.

{¶ 7} 2. Claimant was treated at the hospital where laceration repair surgery was performed and included 14 sutures and Dermabond.

{¶ 8} 3. Claimant began treating with Roman A. Ringle, M.D., a plastic surgeon. In his office note dated October 13, 2008, Dr. Ringle noted:

[H]e sustained a 3cm. complex laceration which extended down to the bone with associated paresthesia. He underwent repair of the laceration in the emergency room and is being referred for follow-up. His past medical history is essentially unremarkable. He is on Keflex and Percocet for pain.

There is no evidence of any cellulitis or infection although there is mild edema in the area. He has paresthesias distal to the laceration as well as proximally. He has a slight amount of weakness in the area with smiling and puckering but it is minimal.

At this point in time it is fair to say that the wound is healing in a totally uneventful fashion. As regards the paresthesia, he may have severed some sensory nerves, but given their location they would have been too small to repair primarily. The marginal mandibular nerve may have been contused, but it is in a wrong position for being transected. He does describe some numbness to the internal lip which is consistent with the injury although his teeth are not numb.

Based on the findings I feel that this will all return over time and this was discussed with him at considerable length.

{¶ 9} 4. Unfortunately, claimant continues to have paresthesia. He describes difficulties chewing (he bites the inside of his lip a lot, and difficulty drinking, as if he can't seal that side of his mouth on the cup). Hair does not grow in the area of the laceration.

{¶ 10} 5. Relator initially certified the claim for "complex laceration right lower chin."

{¶ 11} 6. Claimant sought to have his claim additionally allowed for (att. 4) "facial numbness (782.0); facial scarring (709.2)[;] and facial weakness, droop (781.94)."

{¶ 12} 7. In support of his motion, claimant included the December 16, 2009 report of Dr. Ringle, who stated:

Examination of the laceration scar at his most recent visit showed that he had developed a hairless strip measuring approximately 1 75 cm in size on either side of the scar[.] There were no visible hair follicles even under loupe magnification[.] The scar itself did not show any significant depression or widening and was progressing in an essentially unremarkable fashion. He did complain at his last visit of decreased sensation distal to the laceration as well as some difficulty in full movement of the right lower lip[.] This has not improved[.] He has persistent paresthesia in the region of the injury probably secondary to some transaction of very fine small subcutaneous nerves[.] The decreased ability to move the left lower lip is probably secondary to injury to a very terminal branch of the marginal mandibular nerve which runs through the area where the injury occurred[.] Although one would have expected this to return, it is possible and falls within a reasonable degree of medical probability that it will never return if it has not at this point[.] Usually a year is ad[e]quate to expect the above to occur[.] As a consequence, it is safe to say that some of the decreased sensation and decreased ability to move the right lower lip is a direct consequence of the work injury that he sustained[.] If I can be of any additional assistance on this individual's behalf, please feel free to contact me[.]

{¶ 13} 8. The commission did additionally allow claimant's claim for "facial numbness; facial scarring; facial weakness/droop"; however, relator filed an appeal of the allowance pursuant to R.C. 4123.512. Ultimately, a stipulated judgment entry was filed stating:

This matter came to be heard before the Court on Ford Motor Company's appeal of the additional allowances of "facial numbness; facial scarring; facial weakness/droop" in claim no. 08-883877.

The parties hereby stipulate that said additional allowances are considered symptoms and not conditions and that the claim should be clarified and further allowed for the condition of "nerve injury, facial right." (951.4) The parties agree that this will be the only remaining additional allowance, relative to the original condition of "complex

laceration right lower chin," and that the Industrial Commission may enter an order accordingly.

Plaintiff agrees to waive any right to attorney's fees, pursuant to R.C. §4123.512. Defendant Ford will pay any Court costs. IT IS SO ORDERED.

(Emphasis sic.)

{¶ 14} 9. Claimant sought an additional award, pursuant to R.C. 4123.57(B) for his facial disfigurement. In addition to the previously filed evidence, claimant submitted the March 18, 2010 report of Dr. Ringle wherein he stated:

The diagnosis "injury to marginal mandibular nerve with resulting facial paresthesia and scarring,["] which is appropriate does not coincide with an ICD-9 code other than paresthesia (782 0), scar (709 2) and facial droop (781 94)[.] These are the codes that were sent to you as appropriate diagnoses codes on December 22, 2009[.]

{¶ 15} 10. An independent medical evaluation was conducted by Dean W. Erickson, M.D. In his June 17, 2010 report, Dr. Erickson identified the medical records which he reviewed, and provided his physical findings upon examination. Dr. Erickson was asked whether or not, in his opinion, claimant had sustained an injury to his face which resulted in a serious facial disfigurement and which either impaired or may impair his opportunity to secure and retain employment in the future. Dr. Erickson responded in the negative and stated further the basis for his opinion:

As noted Mr. Ganelli's face is not impaired in any way that would affect his ability to perform gainful employment or impair his opportunity to secure and retain employment.

The only functional impairment Mr. Ganelli has is at times he notes some difficult, [sic] sucking through a straw.

Mr. Ganelli is a skilled tradesman in the auto industry. It is not at all reasonable to expect that Mr. Ganelli's faint scar on the right side of his lower face would impair his future employment opportunities.

Mr. Ganelli requires no treatment for his condition as allowed condition. Mr. Ganelli has no future treatment plans

nor does he require ongoing maintenance treatment for his allowed condition.

Mr. Ganelli has a childhood scar on his lower part of his chin that is not quite as large as the Industrial Injury related scar. Certainly, he has lived well and has been working successfully with Ford Motor Company for the last 11 years and with predecessor companies prior to that without any impairment from that scar.

{¶ 16} 11. Dr. Erickson did acknowledge that it was unlikely that claimant would regain any further sensation in the area of the mandibular nerve injury.

{¶ 17} 12. Claimant's motion was heard before a district hearing officer ("DHO") on August 8, 2011.

{¶ 18} 13. The DHO determined that claimant had met his burden of proof and that he was entitled to an award of \$4,000. Specifically, the DHO stated:

It is the order of the District Hearing Officer that the C-86 Motion filed by the Injured Worker on 04/13/2010 requesting an award of permanent partial disability for a facial disfigurement pursuant to ORC 4123.57(B) [be] granted.

The District Hearing Officer finds that the Injured Worker has incurred a facial disfigurement resulting in a nerve injury and a lack of hair growth at the laceration site. The District Hearing Officer finds per review of the Bureau of Workers' Compensation structural impairment class charts and the functional impairment classes for skin disorders that the Injured Worker has sustained an impairment between class 2 and class 3 as set forth in the charts and is, therefore, entitled to an award of \$4,000.00. This order is based on the medical documentation from Drs. Ringle and Erickson dated 06/17/2010 and 03/18/2010. All medical documentation and testimony presented at hearing was considered.

{¶ 19} 14. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on September 15, 2011. The SHO affirmed the prior DHO order, stating:

It is the order of the Staff Hearing Officer that the C-86 motion filed by Injured Worker on 04/13/2011 requesting an award of permanent partial disability for a facial disfigurement pursuant to R.C. 4123.57(D) [sic] is granted to the following extent.

The Staff Hearing Officer finds that the Injured Worker has incurred a facial disfigurement resulting in a nerve injury and a lack of hair growth at the allowed laceration site. The Staff Hearing Officer finds that, pursuant to the review of the Bureau of Workers' Compensation structural impairment class charts and the functional impairment classes for skin disorders, the Injured Worker has sustained an impairment between Class II and Class III as set forth in the charts and is, therefore, entitled to an award of \$4,000.00.

This order is based on the medical documentation from Dr. Ringle and Dr. Erickson dated 06/17/2010 and 03/18/2010.

{¶ 20} 15. Relator's further appeal was refused by order of the commission mailed October 7, 2011.

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

Conclusions of Law:

{¶ 22} 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).

{¶ 23} 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).

{¶ 24} Relator argues that the commission abused its discretion in two ways: (1) by failing to find that claimant's injury resulted in a serious facial disfigurement of such a nature that it either impairs or may impair in the future, claimant's opportunities to secure and retain employment; and (2) by awarding claimant \$4,000 as that amount is unsupported by the physical findings of the physicians who examined claimant.

{¶ 25} Both claimant and the commission argue that the commission did not abuse its discretion by awarding claimant \$4,000. Both contend that the commission's determination was within the sound discretion of the commission and does not constitute an abuse of discretion.

{¶ 26} For the reasons that follow, it is this magistrate's decision that this court should grant a writ of mandamus, as more fully explained below.

{¶ 27} At issue here is R.C. 4123.57(B), which provides in pertinent part:

In case an injury or occupational disease results in serious facial or head disfigurement which either impairs or may in the future impair the opportunities to secure or retain employment, the administrator shall make an award of compensation as it deems proper and equitable, in view of the nature of the disfigurement, and not to exceed the sum of ten thousand dollars. For the purpose of making the award, it is not material whether the employee is gainfully employed in any occupation or trade at the time of the administrator's determination.

{¶ 28} The statute requires that two findings be made before the commission grants an award of compensation: (1) a claimant's injury must result in serious facial or head disfigurement, and (2) the disfigurement must be of such a nature that impairs, or may in the future impair, the claimant's opportunities to secure or retain employment. *State ex rel. Weyerhaeuser Co. v. Indus. Comm.*, 10th Dist. No. 10AP-580, 2011-Ohio-4206. If the above conditions are met, an award up to \$10,000 may be granted to a claimant as is deemed proper and equitable.

{¶ 29} In *Weyerhaeuser*, this court considered whether or not a claimant must have a current desire to work in order to be compensated under R.C. 4123.57(B). In that case, Jennifer L. Eselgroth sustained a work-related injury and sought an award under the

statute. In the DHO order granting her compensation, the commission described her injury as follows:

Injured Worker has a readily visible scar running from the middle of her forehead to the other side of her eye. The outer edge of the eye is noticeably wider when compared to the other eye. There is also a smaller and less visible scar behind the ear.

Id. at ¶ 24.

{¶ 30} In finding that an award was proper, the DHO made the following findings:

Injured Worker has met her burden of proving that she has this disfigurement as a result of this industrial injury, and that said disfigurement "either impairs or in the future may impair the opportunities to secure or retain employment." District Hearing Officer further finds that the sum of \$3,000.00 is "proper and equitable, in view of the nature of the disfigurement."

Id.

{¶ 31} At the hearing before the SHO, the employer conceded they had no further factual argument to make. However, the employer raised a legal defense. Specifically, the employer argued that because Eselgroth had removed herself from the workforce by applying for and receiving Social Security Disability Benefits, she was ineligible for the award. The commission disagreed.

{¶ 32} On appeal, this court stated:

R.C. 4123.57(B) does not require proof of a current desire to work. By allowing compensation for disfigurement that "may in the future impair" the claimant's employment opportunities, the statute requires the commission to determine whether the disfigurement is such that it creates a potential to impair the claimant's future employment opportunities. This conclusion is underscored by the language describing the manner in which the amount of the award is calculated. In addition to the \$10,000 limitation, the amount must be "proper and equitable" based solely on "the nature of the disfigurement"; the claimant's current employment status is "not material." *Id.* If the legislature did intend for disfigurement compensation to depend on the

existence of a current desire to work, it could have included language to that effect. However, R.C. 4123.57(B) is unambiguous, and this court is not free to insert such language. See *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 676 N.E.2d 519, 1997-Ohio-310.

Id. at ¶ 8.

{¶ 33} The magistrate indicated further that a "disfigurement is 'serious' when it 'either impairs or may in the future impair the opportunities to secure or retain employment.' " *Id.* at ¶ 39. However, this court specifically rejected the magistrate's analysis, stating:

[W]e reject the magistrate's conclusion that R.C. 4123.57(B) defines "serious facial or head disfigurement" as a disfigurement that "either impairs or may in the future impair the opportunities to secure or retain employment." For the reasons set forth above, these are two separate assessments. As the [*State ex rel. Butram v. Indus. Comm.*, 124 Ohio St. 589 (1932)] court explained in applying the prior version of R.C. 4123.57(B), the commission must determine "whether the disfigurement is serious *and* whether it is of such character as to impair the opportunities to secure or retain employment." *Butram* at paragraph one of the syllabus (emphasis added).

{¶ 34} In the present case, the commission's order awarding claimant \$4,000 under R.C. 4123.57(B) states as follows:

It is the order of the Staff Hearing Officer that the C-86 motion filed by Injured Worker on 04/13/2011 requesting an award of permanent partial disability for a facial disfigurement pursuant to R.C. 4123.57(D) [sic] is granted to the following extent.

The Staff Hearing Officer finds that the Injured Worker has incurred a facial disfigurement resulting in a nerve injury and a lack of hair growth at the allowed laceration site. The Staff Hearing Officer finds that, pursuant to the review of the Bureau of Workers' Compensation structural impairment class charts and the functional impairment classes for skin disorders, the Injured Worker has sustained an impairment between Class II and Class III as set forth in the charts and is, therefore, entitled to an award of \$4,000.00.

This order is based on the medical documentation from Dr. Ringle and Dr. Erickson dated 06/17/2010 and 03/18/2010.

{¶ 35} Nowhere in the above order does the commission make a finding that claimant's facial or head disfigurement is serious, nor did the commission make a finding that the disfigurement either impairs or may in the future impair claimant's opportunities to secure or retain employment. Although the commission's order in *Weyerhaeuser* never specifically indicated that the disfigurement was serious, the description of the injury demonstrates that it was significant, especially considering Eselgroth is female. The description of claimant's injury and the photographs in the stipulation of record do not describe a disfigurement of the same nature as Eselgroth's. Because the commission never made these findings, as a result, it is impossible to determine whether or not the \$4,000 awarded is proper and equitable in view of the nature of the disfigurement.

{¶ 36} Because the commission did not make the proper findings in its order, it is this magistrate's decision that this court should issue a writ of mandamus ordering the Industrial Commission of Ohio to vacate its order awarding claimant \$4,000 under R.C. 4123.57(B), and the commission should be ordered to reconsider claimant's motion for compensation under R.C. 4123.57(B), and determine whether or not (1) the injury resulted in serious facial or head disfigurement which (2) either impairs or may in the future impair claimant's opportunities to secure or retain employment.

/S/ MAGISTRATE
STEPHANIE BISCA BROOKS

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).

[Cite as *State ex rel. Ford Motor Co. v. Indus. Comm.*, 2013-Ohio-2310.]