

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Superior Forge & Steel Corporation,	:	
	:	
Relator,	:	
	:	
v.	:	No. 12AP-270
	:	
Industrial Commission of Ohio and Patrick Decker,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on June 13, 2013

*Vorys, Sater, Seymour and Pease LLP, Robert A. Minor, and
Gina R. Russo, for relator.*

*Michael DeWine, Attorney General, and Stephen D. Plymale,
for respondent Industrial Commission of Ohio.*

*Siferd & McCluskey, LPA, Julie M. Shaw, Richard E. Siferd,
and Brian J. Vennekotter, for respondent Patrick Decker.*

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Superior Forge & Steel Corporation ("relator") brings this original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order granting respondent, Patrick Decker ("claimant") permanent partial disability ("PPD") compensation, pursuant to R.C. 4123.57(B), for scheduled loss benefits in connection with injuries to claimant's left hand.

{¶ 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 has now rendered a decision and recommendation that includes findings of fact and conclusions of law, which is appended to this decision. The magistrate concluded that the commission did not abuse its discretion and recommended that this court deny the requested writ of mandamus. Relator filed an objection to the magistrate's decision and the matter is now before us for our independent review.

{¶ 3} As reflected in the facts given in the magistrate's decision, which will only be briefly summarized here, the claimant was involved in a serious work-related accident on April 2, 2008 while employed by relator as a pitman/ladleman. The fingers on claimant's left hand became caught between a chain and a ladle used to pour molten steel, causing a crushing injury. Claimant's middle, ring, and little finger were surgically amputated as a result of the accident. The Ohio Bureau of Workers' Compensation awarded claimant R.C. 4123.57(B) scheduled loss compensation for the amputation loss of his fingers.

{¶ 4} Shortly after the accident, relator and claimant entered into a written vocational rehabilitation agreement, stating that claimant would return to work for relator as a high pressure boiler operator. Relator had a need for an additional high pressure boiler operator and determined that claimant could physically perform the boiler operator job. To qualify for the high pressure boiler operator position, however, claimant would have to spend time on the job working under the direction of a licensed boiler operator, enroll in two classes at a local career center, and successfully complete two licensing examinations.

{¶ 5} On March 10, 2011, claimant filed a motion requesting an additional award for partial loss of use of the left hand under R.C. 4123.57(B). Dennis A. Glazer, M.D., an orthopedic surgeon, examined claimant in June 2011, finding that while claimant retained "excellent pinch function and use of his thumb and index finger," he "did suffer a partial loss of use of his left hand." (June 14, 2011, Report of Dr. Glazer.) Richard M. Ward, M.D., examined claimant in September 2011, finding that "[b]ecause of the loss of the distal 2 segments of the lateral three fingers in his left hand, he has * * * suffered a total loss of use of his left hand." (Sept. 29, 2011, Report of Dr. Ward.) In October 2011, Dr. Samir M. Patel issued a Medco-14, permanently restricting claimant from lifting

greater than five pounds and indicating "no grip left hand." (Oct. 6, 2011, Medco-14 from Dr. Patel.)

{¶ 6} On May 4, 2011, a district hearing officer ("DHO") issued an order awarding R.C. 4123.57(B) scheduled loss compensation to claimant for the loss of use of his left hand. Relator administratively appealed the DHO's decision.

{¶ 7} At an October 6, 2011 hearing before a staff hearing officer ("SHO"), relator's human resources manager, Karen Goodwin, explained that claimant's former position as a pitman/ladleman required "working with chains, [and] hooking chains" which "are extremely large." (SHO Tr., 7.) Following the injury, relator evaluated claimant and determined "that he could not return to that position." (SHO Tr., 8.) Goodwin testified that claimant remained in the same pay rate as a pitman/ladleman while training for the boiler operator position, and would move into a higher wage range once certified as a high pressure boiler operator.

{¶ 8} The SHO issued a decision on October 18, 2011 granting claimant's request for a discretionary loss award under R.C. 4123.57(B). Citing to the medical reports in the record and Goodwin's testimony, the SHO concluded there was "no doubt that the Injured Worker is not currently capable of returning to his prior position of employment and will never be able to return to this position." (SHO Decision, 2.) As such, the SHO concluded that claimant's disability exceeded the normal disability resulting from the loss of those three fingers, and granted claimant's request for an award equivalent to the award for the loss of use of his left hand.

{¶ 9} Relator objects to the magistrate's decision, asserting that there was no evidence before the commission to support a finding that claimant's handicap or disability exceeded the handicap or disability that would normally result from the loss of three fingers. Relator argues the award is unwarranted because claimant "returned to work for the same employer, he received training, he was being groomed for continuing employment, and he suffered no economic loss." (Relator's Objection, 4.) The commission responds noting that "neither scheduled loss of use nor permanent partial disability ("PPD") compensation under R.C. 4123.57 are tied to earnings impairment as [relator] claims." (Commission Response, 3.)

{¶ 10} R.C. 4123.57(B) provides two ways to compensate an individual who has lost fingers as the result of a work-related accident: (1) the "flat loss" theory, and (2) the

"two fingers plus" theory. *State ex rel. Timmerman Truss, Inc. v. Indus. Comm.*, 102 Ohio St.3d 244, 2004-Ohio-2589, ¶ 24. Under the "flat loss" theory, the amount of compensation depends on the affected body part. The loss of certain joints can translate into a full-digit loss, the award for which can range from 15 weeks for the little finger to 60 weeks for the thumb, while the loss of the whole hand entitles the injured worker to 175 weeks of compensation. *Id.* at ¶ 22. For injuries in the intervening range, the "two fingers plus" theory provides as follows:

If the claimant has suffered the loss of two or more fingers by amputation * * * and the nature of the claimant's employment in the course of which the claimant was working at the time of the injury or occupational disease is such that the handicap or disability resulting from the loss of fingers, * * * exceeds the normal handicap or disability resulting from the loss of fingers * * * the administrator may take that fact into consideration and increase the award of compensation accordingly, but the award made shall not exceed the amount of compensation for loss of a hand.

R.C. 4123.57(B).

{¶ 11} By its terms, R.C. 4123.57(B) requires consideration of the nature of the claimant's employment at the time of the injury. *See State ex rel. Crown Zellerbach Corp. v. Indus. Comm.*, 10th Dist. No. 85AP-579 (Jun. 24, 1986) (the "two fingers plus" rule requires "consideration of the handicap or disability which results in relation to the nature of the employment in the course of which claimant was working at the time as compared to the normal handicap or disability that would result to other workers"). When the claimant's injury prevents the claimant from returning to the position they held at the time of the injury, the claimant's "handicap or disability exceede[s] that normally resulting from the loss of fingers," entitling the claimant to enhanced PPD compensation under R.C. 4123.57(B). *Id.*

{¶ 12} In *State ex rel. Interstate Brands Corp. v. Limon*, 10th Dist. No. 02AP-259, 2002-Ohio-6066 the claimant, a machine repairman and supervisor, lost two fingers in a work-related accident. The commission concluded that the claimant "was required to use his fingers to manipulate and use tools" to perform his job, as "[i]n fact, claimant was working as a supervisor using tools to repair a machine when the injury occurred." *Id.* at ¶ 11. Although the claimant was able to return to the supervisory

position he held before the accident, because he could no longer perform the tool manipulation aspect of his former position, this court found some evidence to support the commission's order awarding the claimant enhanced PPD compensation under R.C. 4123.57(B). *See also State ex rel. Employee Leasing Servs., Inc. v. Amissah*, 10th Dist. No. 08AP-151, 2008-Ohio-6423, ¶ 36 (commission did not abuse its discretion in granting the claimant an award for the total loss of use of his left hand under R.C. 4123.57(B) as the evidence demonstrated that the claimant "worked as a laborer in a steel company" putting "clamps on the metals," and a doctor's report demonstrated that, due to the injury to his hand and arm, the "claimant could not return to his former position of employment").

{¶ 13} Relator asserts that because claimant was being groomed for a more profitable position and did not suffer economic loss as a result of the accident, he could not satisfy the "two fingers plus" rule in R.C. 4123.57(B). As *Zellerback* and *Interstate Brands* demonstrate, however, the determinative issue under the "two fingers plus" rule in R.C. 4123.57(B) is not whether the claimant has suffered economic loss, but rather whether the injury has prevented the claimant from engaging in the work the claimant was performing at the time of the injury. Notably, compensation "for loss of a body part, or its use, under former R.C. 4123.57(C) [current R.C. 4123.57(B)] bears a closer resemblance to damages than it does to compensation for impaired earning capacity or loss of employment." *State ex rel. Doughty v. Indus. Comm.*, 61 Ohio St.3d 736, 739 (1991). *See also State ex rel. Miller v. Indus. Comm.*, 97 Ohio St.3d 418, 2002-Ohio-6664, ¶ 12 (noting that while "[t]otal disability benefits, whether temporary or permanent, compensate for the loss of earnings or earning capacity," in contrast "partial disability benefits have been compared to damages and are awarded irrespective of work capacity").

{¶ 14} The SHO relied on the medical reports from Dr. Glazer, Dr. Ward, and Dr. Patel, and the testimony from Karen Goodwin to conclude that claimant could not return to his former position as a pitman/ladleman, thus rendering claimant's handicap or disability resulting from the loss of his fingers greater than the normal handicap or disability resulting from such a loss. As such, there was some evidence to support the commission's order granting claimant enhanced PPD benefits.

{¶ 15} Upon a review of the magistrate's decision and an independent review of the record, this court adopts the magistrate's decision as its own. Relator's objection to the magistrate's decision is overruled and the requested writ of mandamus is denied.

*Objection overruled;
writ of mandamus denied.*

TYACK and SADLER, JJ., concur.

A P P E N D I X

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Industrial Commission of Ohio and Patrick Decker,	:	(REGULAR CALENDAR)
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Respondents.	:	

MAGISTRATE'S DECISION

Rendered on September 28, 2012

*Vorys, Sater, Seymour and Pease LLP, Robert A. Minor and
Gina R. Russo, for relator.*

*Michael DeWine, Attorney General, and Stephen D. Plymale,
for respondent Industrial Commission of Ohio.*

*Siferd & McCluskey, LPA, Julie M. Shaw, Richard E. Siferd,
and Brian J. Vennekotter, for respondent Patrick Decker.*

IN MANDAMUS

{¶ 16} In this original action, relator, Superior Forge & Steel Corporation ("Superior Forge" or "relator") requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding to respondent Patrick Decker ("claimant") R.C. 4123.57(B) scheduled loss compensation

for loss of his left hand under the "two fingers plus" provision of the statute, and to enter an order denying the compensation.

Findings of Fact:

{¶ 17} 1. On April 2, 2008, claimant was injured while employed as a pitman/ladleman for relator, a state-fund employer. On that date, the fingers of his left hand became caught between a chain and a ladle used to pour molten steel, causing a crushing injury.

{¶ 18} 2. On the date of injury, claimant was transported to St. Rita's Hospital where he underwent surgical amputation of the PIP joints of his middle (long), ring, and little fingers. Claimant subsequently underwent four other surgeries.

{¶ 19} 3. The industrial claim (No. 08-819203) is allowed for:

Crushing injury of left hand; amputation mid left third, fourth finger; amputation mid left fifth finger; fracture mid/proximal phalanx left third finger; open wound left third finger with tendon; neuroma amputation stump left fourth and fifth finger.

{¶ 20} 4. In February 2010, the Ohio Bureau of Workers' Compensation ("bureau") awarded claimant R.C. 4123.57(B) scheduled loss compensation for the amputation loss of the third, fourth, and fifth fingers of the left hand.

{¶ 21} 5. On March 10, 2011, claimant filed a motion requesting "[a]n additional award for partial loss of use of the left hand under R.C. 4123.57." For evidentiary support, the motion says: "See the medical already in the file."

{¶ 22} 6. On June 14, 2011, at relator's request, claimant was examined by orthopedic surgeon, Dennis A. Glazer, M.D. In his three-page narrative report, Dr. Glazer concludes:

It is my opinion within reasonable medical certainty that the claimant did suffer a partial loss of use of his left hand. He is right hand dominant. He is still employable and had several vocational rehab reviews finding him capable of performing the job for which he is now training. There is no total loss of use of his hand. He still has excellent pinch function and use of his thumb and index finger is complete. He still has some functional use of his middle, ring, and little finger.

{¶ 23} 7. On September 29, 2011, at claimant's request, he was examined by orthopedic surgeon Richard M. Ward, M.D. In his one-page narrative report, Dr. Ward opines:

He is 6' 1" tall, weighs 330 lbs and is left [sic] handed. On examining his left hand he has lost the distal two segments of fingers 3, 4 and 5. Because of the loss of the distal 2 segments of the lateral three fingers in his left hand, he has, in my opinion, suffered a total loss of use of his left hand. This should be an award to him. This opinion is certainly based upon a reasonable medical probability.

{¶ 24} 8. On October 6, 2011, orthopedic surgeon and attending physician Samir M. Patel, M.D., issued a corrected MEDCO-14. On the MEDCO-14, Dr. Patel permanently restricted claimant from lifting greater than five pounds. Dr. Patel also wrote "no grip left hand."

{¶ 25} 9. Earlier, in October 2008, relator and claimant entered into a written rehabilitation agreement. On bureau form RH-2 the vocational rehabilitation case manager reported:

I met with his employer and arranged for an onsite Occupational assessment with the therapist from Worker's Choice. We identified a suitable job for Mr. Decker's return and also identified training that will be required for him to complete before the job can be permanently assigned. His goal will be a High Pressure Boiler operator. This position requires not only time on the job but also successful completion of two short term training programs available at Apollo Career Center but also successfully completing two licensing examinations. He will first gather experience by working under the direction of a licensed boiler operator and will then enroll in the low pressure boiler operator class offered in either November 2008 or January 2009, depending upon the number of students registering for the program.

He is released to return to work effecting [sic] 11/3/08 and will work along with the licensed boiler operation at Superior Forge and Steel. This plan request [return to work] follow up services to assure successful return to work. The file will then be closed if he is working successfully but will be reopened and services will be provided as "job retention" when the boiler operator classes are offered.

* * *

I met with and spoke to Karen Goodwin, Employee Relations, of Superior Forge and Steel on August 5th and again on October 31st. The employer along with the [Injured Worker], occupational therapist and this case manager have identified boiler operator positions that [are] suitable with appropriate training.

{¶ 26} 10. In December 2009, relator and claimant entered into another written rehabilitation agreement. On bureau form RH-2, a bureau representative wrote:

In August 2009, he was re-referred for rehabilitation service and at that time, I again attempted to prepare a plan for short-term vocational training at Apollo Vocational Center. I asked the class instructor, Mr. Ralph Wolf, to interview Mr. Decker to determine if he was capable of skipping the low pressure boiler operator's class and start the high pressure boiler operator's class instead. Following Mr. Wolf's interview, he determined that Mr. Decker would benefit from the low-pressure boiler operator's course prior to a more advanced program. We had previously provided vocational testing to Mr. Decker and while his scores were somewhat marginal, it appeared as though the academic skills were high enough for probable success in the training program if he concentrated and worked hard on the principles and dynamics of the low pressure operator's class.

I also referred Mr. Decker to the Bureau of Vocational Rehabilitation to determine if they could help underwrite the cost of the short term training program. However, because Mr. Decker was employed, the Bureau of Vocational Rehabilitation did not find him eligible.

He has been cleared by his attending physician to work in the capacity of the boiler operator, has completed vocational testing, and his employer has agreed to maintain his employment as a boiler operator assistant operator until he successfully completes both the low pressure boiler operator class and the high pressure boiler operator program. He would then need to take the state license examination so that he could continue his employment in this capacity with Superior Forge and Steel.

{¶ 27} 11. In August 2011, relator and claimant entered into another written rehabilitation agreement. On bureau form RH-2, a bureau representative wrote:

Mr. Decker completed the High Pressure certification training at Upper Valley Adult Education in Piqua, OH on 06/23/2011.

* * *

Mr. Decker is in the post-training phase and is preparing to sit for the State of Ohio High Pressure Boiler Operator certification exam.

{¶ 28} 12. Following a May 4, 2011 hearing, a district hearing officer ("DHO") issued an order awarding R.C. 4123.57(B) scheduled loss compensation for loss of use of the left hand.

{¶ 29} 13. Relator administratively appealed the DHO's order of May 4, 2011.

{¶ 30} 14. On October 6, 2011, the administrative appeal was heard by a staff hearing officer ("SHO"). The hearing was recorded and transcribed for the record.

{¶ 31} 15. At the hearing, relator's human resources manager, Karen Goodman, was questioned on direct examination by relator's counsel:

Q. What was Patrick's job at the time that he was hurt?

A. At the time he was hurt, he was working as a pitman ladleman in our melting department.

Q. And could he go back to that job?

A. He cannot go back to that job.

Q. And tell [the hearing officer] why that is, please?

A. That job entails, and as his injury indicates at the time of his injury, he was working with chains, hooking chains. That job, at the beginning, in the melting process, we're even at -- on a bigger scale, several hundred thousand pounds melting at one time. So the equipment that they're using and the chains that they're using are extremely large. And with his injury, returning to that position, we felt and -- and his evaluations, they felt that he could not return to that position.

Q. And, excuse me, at some time was Patrick able to return to work at Superior?

A. Yes, he was. He did return to work.

Q. And in what capacity did he come back in?

A. We were able to -- at that time, we had a need for an additional boiler operator. We wanted Patrick to be able to return to work. He was a good employee. So we decided to have an evaluation done with respect to requirements of our high pressure boiler operators and Patrick's abilities at that point in time. We had Patrick come in. We also had a physical therapist come in, look at the job requirements. She felt that he could meet those requirements. The only obstacle at that point was that he needed a license to run our high pressure boiler, and he did not have that license at that point in time. We decided that if Patrick would agree, and we could set it up through Vocational Rehab, that Patrick would go to school to obtain license. And then once he had the license, he would work at our facility as a high pressure boiler operator.

In the interim, he would actually not run the -- the boiler, unless -- he would learn the job, but he would not be able to run the boiler or do those things by himself. He would always have to be with another licensed operator. So that's what Patrick has been doing throughout this process.

Q. And with regard to his rate of pay, what change, if any, has there been in his rate of pay since the time of his injury?

A. He has remained in his initial classification as a pitman ladleman. However, he has received increases, as he would normally, in that classification. He cannot actually move into the high wage range for the high pressure boiler operator until he actually has the license.

Q. And I believe you -- you mentioned that he had to take classes. Was this done through Vocational Rehabilitation by itself, or did Superior help him out with regard to pay?

A. There have been things that we have paid for through -- it's a combination -- through the Vocational Rehab Program, but we have agreed to pay Patrick while he has attend classes, so he actually, when he attends classes, he actually is receiving his -- his normal pay. We have also paid for applications, various things of that nature, that have come up. We have agreed to pay for any testing fees, application fees, things of that nature.

16. At the hearing, claimant was questioned by his counsel:

Q. Patrick, if you could briefly, could you explain to the Hearing Officer what your job duties are now, and how much of the use of your left hand is required to fulfill your job duties?

A. Originally I was told to see how much I use my left hand in my work, and I did do that. I -- I -- I can complete my job in an entire month with only using my left hand twice.

Q. And when do you use it?

A. To use a dolly, and the dolly pushes right in here, and then to hold salt bags to put them on softeners, but other than that --

[Hearing Officer]: What job are you doing right now?

The Witness: I'm a boiler operator.

[Hearing Officer]: So it is the boiler operator job --

The Witness: Yes.

[Hearing Officer]: -- that you're currently doing? Okay.

The Witness: And I open a lot of valves, but we use pipe wrenches for all of them. And I'm right handed, so I use right hand and pull chains, and watch a pressure gauge, and that's about all I do.

{¶ 32} 17. Following the October 6, 2011 hearing, the SHO issued an order affirming the DHO's order. The SHO's order explains:

The order of the District Hearing Officer, issued 05/07/2011, is modified with the following rationale.

It is the order of the Staff Hearing Officer that the C-86 motion filed by the Injured Worker on 03/10/2011 is granted to the extent of this order.

The Injured Worker requested a discretionary loss award under Ohio Revised Code section 4123.57(B) which provides, in pertinent part that: "If the claimant has suffered the loss of two or more fingers by amputation or ankylosis and the nature of his employment * * * is such that the handicap or disability resulting from the loss of fingers, or loss of use of fingers, exceeds the normal handicap or disability resulting

from the loss of fingers, or loss of use of fingers, the Commission may take that fact into consideration and increase the award of compensation accordingly, but the award made shall not exceed the amount of compensation for loss of a hand."

The Injured Worker was evaluated by Dr. Glazer on 06/14/2011. He opined that the Injured Worker did suffer a partial loss of use of his left hand due to the crush injury of the left hand with associated amputation of the mid left third, fourth and fifth fingers. Dr. Glazer noted that the Injured Worker was not able to return to his prior position of employment but with the help of vocational rehabilitation was capable of performing the new job for which he is currently training. He opined there was no total loss of use because the Injured Worker had an excellent pinch function for the use of his thumb and index finger and some marginal use of his middle, ring and little finger stumps. However, Dr. Glazer's opinion does not address the standard for the discretionary loss under Ohio Revised Code section 4123.57(B).

There is no doubt that the Injured Worker is not currently capable of returning to his prior position of employment and will never be able to return to this position. This finding is based upon the testimony of Ms. Goodwin on pages 6 through 8 of the testimony taken at the Staff level hearing and medical reports of Dr. Glazer and Patel on file. Ms. Goodwin indicated that Mr. Decker was employed as a pitman ladleman in the melting department of the Employer of record and could not go back to that job related to the injury induced disabilities/amputations of his fingers.

Based upon the 09/29/2011 report of Dr. Ward, 06/14/2011 report of Dr. Glazer and MEDCO-14s on file from the treating orthopedic surgeon, Dr. Patel, dated 04/01/2009 and 04/04/2011, Mr. Decker clearly has a diminished capacity of use with his left hand. Prior to his injury Mr. Decker's job required him working with large chains, hooking and unhooking them on a regular basis as noted by the testimony of Ms. Goodwin. The Employer (see testimony at page 8) evaluated the Injured Worker and the job and felt he could not return to the prior position of employment.

To the Employer's credit the Injured Worker was offered a position as a high pressure broiler [sic] operator, which is a position that he is capable of performing with his current

restrictions. The Employer, again to their credit, is assisting the Injured Worker in receiving the appropriate training and accreditation to perform this new job duty.

This Staff Hearing Officer finds the Injured Worker's disability due to the loss of his left middle, ring and little fingers exceeds the normal disability resulting from the loss of use of those fingers. Specifically, he was unable to return to his prior position of employment and is required to learn a new type of employment secondary to the injury. The 04/01/2009 MEDCO-14 of Dr. Patel, the treating orthopedic surgeon, limited the Injured Worker to lifting no more than five pounds with his left hand and no gripping with his left hand. On a MEDCO-14 of 04/04/2011 Dr. Patel increased the lifting ability to fifteen pounds with the left hand. However, on 10/06/2011 the 04/04/2011 MEDCO-14 was amended/corrected to again limit the Injured Worker to five pounds of lifting and no gripping with the left hand.

Based upon the foregoing, this Staff Hearing Officer finds that the Injured Worker has shown disability due to the loss of his left middle, ring, and little fingers that exceeds the normal disability resulting from the loss of use of those fingers.

Based upon the foregoing, this Staff Hearing Officer grants the Injured Worker an award equivalent to the award for the loss of use of his left hand, 175 weeks, less any previously paid amputation award for the amputations of the left third, fourth and fifth fingers.

The remainder of the District Hearing Officer's order, not in conflict with this order, remains in full force and effect.

{¶ 33} 18. On November 9, 2011, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of October 6, 2011.

{¶ 34} 19. Relator moved for reconsideration.

{¶ 35} 20. On January 11, 2012, the three-member commission, on a two-to-one vote, mailed an order denying relator's motion for reconsideration.

{¶ 36} 21. On March 27, 2012, relator, Superior Forge & Steel Corporation, filed this mandamus action.

Conclusions of Law:

{¶ 37} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 38} R.C. 4123.57(B) provides for so-called scheduled loss compensation. Pertinent here, the statute provides for 175 weeks of compensation for loss of a hand, and lesser weeks of compensation for loss of any of the five fingers of the hand. For example, for loss of the third finger ("long finger") 30 weeks of compensation shall be paid. For loss of the fourth finger ("ring finger") 20 weeks of compensation shall be paid, and for loss of the fifth finger ("little finger") 15 weeks of compensation shall be paid.

{¶ 39} The statute provides for two theories under which compensation for loss of a hand may be based: (1) the so-called "flat loss" theory, and (2) the so-called "two fingers plus" theory. *State ex rel. Timmerman Truss, Inc. v. Indus. Comm.*, 102 Ohio St.3d 244, 2004-Ohio-2589.

{¶ 40} The so-called "flat loss" theory is premised upon amputation loss or loss of use of the fingers and parts of the hand. *Id.*

{¶ 41} The so-called "two fingers plus" theory is set forth in the following paragraph of R.C. 4123.57(B):

If the claimant has suffered the loss of two or more fingers by amputation or ankylosis and the nature of the claimant's employment in the course of which the claimant was working at the time of the injury or occupational disease is such that the handicap or disability resulting from the loss of fingers, or loss of use of fingers, exceeds the normal handicap or disability resulting from the loss of fingers, or loss of use of fingers, the administrator may take that fact into consideration and increase the award of compensation accordingly, but the award made shall not exceed the amount of compensation for loss of a hand.

{¶ 42} It is the above quoted provision of R.C. 4123.57(B) setting forth the "two fingers plus" theory that is at issue here.

{¶ 43} According to relator, even though the loss of three fingers of the left hand undisputedly prevents claimant from returning to his former position as a pitman/ladleman, because claimant has retained his employment at Superior Forge and has essentially sustained no loss of wages or other economic loss due to his injury, it cannot be found that claimant's handicap or disability, "exceeds the normal handicap or disability," within the meaning of the statute. Relator points out that, as Ms. Goodman testified, subsequent to the injury, claimant remained in his classification as a

pitman/ladleman and received the normal wage increases in that classification. Also, with the relator's encouragement, claimant has a very real opportunity to become a licensed high pressure boiler operator which pays more than the job at which he was injured.

{¶ 44} According to relator, the commission improperly focused on claimant's inability to return to his former position of employment and ignored that claimant has "not experienced an economic loss" and has a very real opportunity to obtain better paying work as a licensed high pressure boiler operator. (Relator's brief, at 7.) As relator puts it: "How can it be fairly said that his situation is appreciatively different or worse than those who have suffered the loss of three fingers?" (Relator's brief, at 7.)

{¶ 45} The issue before this court is aided by an examination of case law involving decisions regarding the statute.

{¶ 46} *State ex rel. Interstate Brands Corp. v. Limon*, 10th Dist. No. 02AP-259, 2002-Ohio-6066 is instructive.

{¶ 47} In the *Interstate* case, the claimant, Amador Limon sustained amputations of the index and middle fingers of his left hand. Also, Dr. Frank C. Hui opined that Limon had substantial loss of function of the ring and little fingers of his left hand.

{¶ 48} Finding that Limon's handicap or disability resulting from loss of his fingers exceeds the normal handicap or disability resulting from such loss, the commission, through its SHO, awarded Limon compensation for loss of his left hand. The commission's order explained:

"The claimant's work background has been as a machine repairman and mechanic. Claimant's job, at the time of the injury, was 'machine repair supervisor.' Claimant still is working in this position with the instant employer. However, clearly claimant is not capable of working with the tools as he was prior to the injury. Claimant testified that his job duties have modified since the injury to the extent that he can't fix the machines as before the injury. The employer has been accommodating the claimant in this regard.

"The employer disputes the total loss of use award contending that the claimant is performing the same job as prior to the injury. This Staff Hearing Officer does not find the employer's contention to be persuasive. The claimant's left hand is essentially useless. The claimant's work experience is as a machine repairman. He was recently

promoted to a supervisor position just prior to the injury. He suffered a traumatic injury to the left hand repairing a bread machine while he was working as a 'supervisor.' The instant injury itself is proof that claimant's job as a 'supervisor' prior to the injury involved working with tools with both hands.

"The instant injury has caused disability and handicaps greater than normal. The injury resulted in a functional loss of use of the left hand causing a handicap and disability exceeding the normal for this injured worker with experience as a machine repairman.["]

Id. at ¶ 30-32.

{¶ 49} In the *Interstate* case, this court upheld the commission's decision, explaining:

Here, there is no argument that claimant lost two fingers by amputation and there is some evidence that claimant suffered a greater than normal disability. Despite the testimony of relator's employees that claimant has returned to the same position of employment he held before the injury and that the injury did not prevent his return to work, there is some evidence to support the commission's order.

Claimant is a supervisor of mechanics and the commission found he was required to use his fingers to manipulate and use tools. Claimant testified that it is sometimes quicker for him to make repairs to avoid down time on the production line, than to show employees how to do a repair. In fact, claimant was working as a supervisor using tools to repair a machine when the injury occurred. Thus, the commission properly considered all of the circumstances of claimant's employment, not just his job title, and there is evidence to support its decision.

Id. at ¶ 10-11.

{¶ 50} Significantly, it can be observed that, in the *Interstate* case, Limon apparently did not experience an economic loss due to his injury because he was able to return to his position as a machine repair supervisor. Nevertheless, Limon's finger losses did negatively impact his ability to perform his supervisory position and it also foreclosed the job as a machine repairman and mechanic that he had held prior to his promotion to the supervisory position.

{¶ 51} Obviously, the lack of an economic loss is not considered dispositive or even relevant to the commission's decision in the *Interstate* case or to this court's decision upholding the commission's determination. Rather, what was considered dispositive and relevant was the negative impact of the finger losses upon Limon's ability to perform some of the tasks of his supervisory position as well as the foreclosure of any return to his former position as a machine repairman and mechanic.

{¶ 52} Given the analysis of this court's decision in the *Interstate* case, the magistrate concludes that the commission did not abuse its discretion in awarding to the instant claimant an R.C. 4123.57(B) award for loss of his left hand. The commission's determination properly focused upon the undisputed fact that the finger losses prohibit claimant's performance of the essential tasks of his former position of employment as a pitman/ladleman even though claimant has had the good fortune of having another job to perform that has avoided any economic loss.

{¶ 53} Relator's reliance upon this court's decision in *State ex rel. Morgan v. Superior Fibers, Inc.*, 10th Dist. No. 02AP-20, 2002-Ohio-4550 is misplaced.

{¶ 54} In *Morgan*, the claimant, Larry A. Morgan, sustained traumatic amputations of all four fingers of his right hand, which was his dominant hand. The doctors reattached three fingers but not the index finger. Morgan received compensation for the loss of the four fingers.

{¶ 55} In November 2000, Morgan was examined by Nancy Renneker, M.D. Morgan had difficulty writing with his right hand. He explained to Dr. Renneker that writing was easier with a fat pen but was generally painful and difficult and that he could write only a few words at a time without resting. Morgan told Dr. Renneker, that in his job as a supervisor, he signed time cards and wrote job assignments.

{¶ 56} In January 2001, Morgan was examined by Brian Higgins, D.O., who noted that Morgan had returned to his regular work but reported difficulty carrying a jug of milk, typing, and writing.

{¶ 57} In August 2001, Morgan was examined by Dr. Kiva Shtull who viewed Morgan's job description in both written and video graphic form. Dr. Shtull opined that Morgan had not sustained a total loss of use of his hand beyond the impairment assessed for each of the fingers.

{¶ 58} It can be noted that this court's decision in *Morgan* preceded this court's decision in the *Interstate* case by two months. This court's decision in the *Interstate* case does not cite to or discuss this court's decision in *Morgan*. One obvious difference between the cases is that *Morgan* involved the commission's denial of an award while the *Interstate* case involved the commission's granting of an award. This difference may be significant under the abuse of discretion standard.

{¶ 59} In the magistrate's view, it is significant that, in *Morgan*, the commission found that "[w]hile the claimant has many additional problems at work, he is still in the same job in which he was at when injured." *Morgan* at ¶ 8. Also significant is that the commission's order in *Morgan* does not address the impact of Morgan's writing difficulty upon the performance of his supervisory job. Furthermore, the commission's analysis in *Morgan* does not tell us the extent to which handwriting was required in Morgan's supervisory job.

{¶ 60} In the magistrate's view, the *Interstate* case more specifically speaks to the issue before this court in the instant case. Again, as in the *Interstate* case and here, it is the employer who brings the action challenging the commission's exercise of its discretion.

{¶ 61} Accordingly, for all of the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke

KENNETH W. MACKE
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).