

[Cite as *State ex rel. Weyerhaeuser Co. v. Indus. Comm.*, 2011-Ohio-4206.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Weyerhaeuser Company, fka Willamette Industries, Inc.,	:	
	:	
Relator,	:	No. 10AP-580
v.	:	(REGULAR CALENDAR)
The Industrial Commission of Ohio and Jennifer L. Eselgroth,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on August 23, 2011

Reminger Co., L.P.A., and Ronald A. Fresco, for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} In this original action, relator, Weyerhaeuser Company, fka Willamette Industries, Inc., requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order awarding respondent,

Jennifer L. Eselgroth ("claimant"), compensation for facial disfigurement, pursuant to R.C. 4123.57(B), and to enter an order denying the compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the commission did not abuse its discretion in awarding claimant \$3,000 for facial disfigurement under R.C. 4123.57(B), reasoning that the statute did not require proof of claimant's current desire to work. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

{¶3} Relator now raises the following two objections to the magistrate's decision:

OBJECTION NO. 1: Dr. Bruce G. French was Respondent Eselgroth's physician of record.

OBJECTION NO. 2: Facial disfigurement, as an earning capacity award, requires an earning capacity.

{¶4} To obtain a writ of mandamus, a relator must show that it has a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. AutoZone, Inc. v. Indus. Comm.*, 117 Ohio St.3d 186, 2008-Ohio-541, ¶14. "To show the clear legal right, relator must demonstrate that the commission abused its discretion by entering an order unsupported by some evidence in the record." *State ex rel. Hughes v. Goodyear Tire & Rubber Co.* (1986), 26 Ohio St.3d 71, 73. When the record contains "some evidence" to support the commission's factual findings, a court may not disturb the commission's findings in mandamus. *State ex rel. Fiber-Lite Corp. v. Indus. Comm.* (1988), 36 Ohio St.3d 202, syllabus.

{¶5} For ease of discussion, we will begin by addressing relator's second objection, which challenges the magistrate's conclusions of law. Specifically, relator asserts that a claimant must demonstrate a current desire to work in order to obtain facial-disfigurement compensation under R.C. 4123.57(B). Because claimant testified that she removed herself from the workforce and began receiving social security disability ("SSD"), relator contends that she lacked any desire to work and, therefore, had no earning capacity that could be impaired by her facial disfigurement.

{¶6} The provision in R.C. 4123.57(B) governing facial-disfigurement compensation provides:

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.

{¶7} This language imposes two requirements for compensation: (1) the claimant's injury must result in serious head or facial disfigurement, and (2) the disfigurement must be of such a nature that it either impairs or may in the future impair the claimant's opportunities to secure or retain employment. In examining a prior version of the statute, the Supreme Court of Ohio has held that, in the absence of an abuse of discretion, the commission is the "sole and final arbiter" of determining whether a claimant's disfigurement satisfies each of the above requirements. *State ex*

rel. Butram v. Indus. Comm. (1932), 124 Ohio St. 589, paragraph one of the syllabus, citing G.C. 1465-80 (110 Ohio Laws, pp. 225, 226).¹

{¶8} Contrary to relator's assertions, 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, 1997-Ohio-310.

{¶9} The district hearing officer ("DHO") and the staff hearing officer ("SHO") recognized this principle in determining that claimant's disfigurement was of such a nature that it "may in the future impair" claimant's employment opportunities. Although claimant testified that she was receiving SSD benefits and had removed herself from the workforce, the DHO and SHO found her disfigurement to be such that it could potentially impair her employment opportunities should she return to the workforce.

¹ G.C. 1465-80 did not include the additional "may in the future impair" language that is now contained in R.C. 4123.57(B).

This conclusion was based on the DHO's observations of claimant's appearance at the hearing and claimant's testimony.

{¶10} Based on the circumstances of this case, we find that the commission's award was based on "some evidence" that claimant's facial disfigurement was of such a nature that it "may in the future impair" her opportunities to secure or retain employment. The commission did not abuse its discretion in arriving at this conclusion merely because additional evidence indicated that claimant was receiving SSD benefits and had removed herself from the workforce at the time of her application. Our role is not to "micromanage the commission as it carries out the business of compensating for industrial/occupational injuries and illness." *State ex rel. Mobley v. Indus. Comm.*, 78 Ohio St.3d 579, 584, 1997-Ohio-181. "Where a commission order is adequately explained and based on some evidence, even evidence that may be persuasively contradicted by other evidence of record, the order will not be disturbed as manifesting an abuse of discretion." *Id.*

{¶11} However, while we agree with the magistrate's conclusion of law that a current desire to work is not a prerequisite for obtaining facial-disfigurement compensation under R.C. 4123.57(B), we 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 *Butram* 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). We therefore reject the analysis in ¶39 of the magistrate's decision. Our rejection of this portion of the magistrate's decision does not affect our previous analysis and conclusion that "some evidence" supported the commission's facial-disfigurement award. Accordingly, relator's second objection is overruled.

{¶12} The precise challenge raised in relator's first objection is unclear. "An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). Objections may be overruled for failing to conform to this rule. See *State ex rel. Guess v. McGrath*, 10th Dist. No. 02AP-156, 2002-Ohio-4896, ¶4 (applying former Civ.R. 53(E)(3)(b)).

{¶13} The objection is phrased as a statement of fact that, seemingly, disputes the magistrate's finding that Dr. French examined claimant at relator's request on July 1, 2004. However, relator fails to reference any evidence from the record to disprove or contradict this finding. Instead, relator claims that "the relevance of Dr. French's involvement in the case goes directly to [claimant's] earning capacity," and, by way of argument, advances the same *legal* challenges presented in the second objection. (Objection at 2.) Thus, it is unclear whether relator's first objection objects to findings of fact or conclusions of law.

{¶14} Because relator's first objection lacks specificity and fails to state particular grounds or evidentiary support, we reject any factual challenge raised by the objection

for failure to comply with Civ.R. 53(D)(3)(b)(ii).² To the extent relator claims that facial-disfigurement compensation requires proof of a current earning capacity, we have already rejected this contention in our disposition of the second objection. Accordingly, relator's first objection is overruled.

{¶15} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, adopt the magistrate's decision as our own, including the findings of fact and conclusions of law as modified.

{¶16} Accordingly, relator's objections to the magistrate's decision are overruled, and the requested writ of mandamus is hereby denied.

*Objections overruled;
writ of mandamus denied.*

CONNOR and DORRIAN, JJ., concur.

² Even if the record did not support the magistrate's finding that Dr. French examined claimant at relator's request, such a determination "is not significant to the matters to be resolved in relator's requested writ or its objections to the conclusions of law." See *State ex rel. Medcorp, Inc. v. Ryan*, 10th Dist. No. 06AP-1223, 2008-Ohio-2835, ¶4.

A P P E N D I X

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and Jennifer L. Eselgroth,	:	
	:	
Respondents.	:	

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

Rendered on April 29, 2011

Reminger Co., L.P.A., and Ronald A. Fresco, for relator.

*Michael DeWine, Attorney General, and Kevin J. Reis, for
respondent Industrial Commission of Ohio.*

IN MANDAMUS

{¶17} In this original action, relator, Weyerhaeuser Company, fka Willamette Industries, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding R.C. 4123.57(B) compensation to respondent Jennifer L. Eselgroth ("claimant") for facial disfigurement, and to enter an order denying the compensation.

Findings of Fact:

{¶18} 1. On January 26, 2001, claimant sustained an industrial injury (No. 01-802923) while employed as a forklift operator for relator, a self-insured employer under Ohio's workers' compensation laws. The industrial claim is allowed for:

Head injury; fracture right ankle; brain laceration, brief with coma; basilar skull fracture; multiple facial fractures including a partial avulsion of the oracle; osteomyelitis of the right ankle.

{¶19} 2. Apparently claimant received temporary total disability ("TTD") compensation.

{¶20} 3. On July 1, 2004, claimant was examined at relator's request by Bruce G. French, M.D. Dr. French opined:

* * * I think that she is fast approaching her maximal medical improvement and it is my estimation that she will never be able to return to work as a heavy laborer or a machine operator. She would be capable of sedentary activity only such as a desk job with only light lifting of 10-15 pounds on a repeated basis or perhaps in a sedentary job using grasping type activities but I would not clear her to return to operating heavy machinery. * * *

{¶21} 4. On July 15, 2004, responding to relator's inquiry, Dr. French opined: "[Patient] will be [maximum medical improvement] on 10-1-04."

{¶22} 5. Apparently, relator terminated TTD compensation effective October 1, 2004 based upon the reports of Dr. French.

{¶23} 6. On August 11, 2009, claimant moved for R.C. 4123.57(B) compensation for facial disfigurement.

{¶24} 7. Following a September 24, 2009 hearing, a district hearing officer ("DHO") issued an order granting the motion:

Injured Worker is hereby GRANTED \$ 3,000.00 in facial disfigurement compensation pursuant to O.R.C. 4123.57 (B).

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. While it would certainly be helpful if Injured Worker had complied with Employer's request to produce pictures of herself prior to her injury, District Hearing Officer nonetheless finds credible her testimony that these features only appeared after this injury. Of course, should either party choose to appeal this order, and should Injured Worker STILL refuse to produce any pictures of how she looked prior to the injury, that might well raise some questions at the next hearing. Please note that Injured Worker testified that there are pictures of herself prior to the injury at her mother's house, among other places.

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."

Employer also argues that because Injured Worker has removed herself from the workforce by applying for and receiving Social Security disability benefits, that she is ineligible for this award. District Hearing Officer disagrees. The statute talks about a disfigurement that "in the future MAY" impair employment. Since Injured Worker MAY in the future attempt to return to the workforce, and since District Hearing Officer finds that if she did she would face an impairment in opportunities due to the facial disfigurement she suffered in this industrial injury, she is not disqualified from getting this award simply because she is not in the workforce today.

This order is based upon Injured Worker's testimony and District Hearing Officer's observations of her face.

(Emphases sic.)

{¶25} 8. Relator administratively appealed the DHO's order of September 24, 2009.

{¶26} 9. Following an October 28, 2009 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order:

The Staff Hearing Officer affirms the District Hearing Officer's award of \$3,000.00 for a facial disfigurement, under the provisions of ORC 4123.57(B).

ORC 4123.57(B) 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, not to exceed the sum of \$10,000.00. 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.["]

At hearing, the Injured Worker displayed a photograph of her appearance sometime before her allowed industrial injury. In response to this photograph, the Employer conceded that they have no further factual argument to make in defense of the award. The Employer does raise a legal defense. The Staff Hearing Officer does not find this legal defense to be well taken.

The Employer argues that in light of the fact that the Injured Worker is currently receiving an award of disability social security, and has testified at this hearing that she has not sought employment since she received this award, that the Injured Worker's application is premature. The Employer interprets an award of facial disfigurement as being in the nature of an award for impairment of earning capacity, similar to awards under ORC 4123.57(A) as it read prior to 08/22/1986. The Staff Hearing Officer agrees that there are some similarities between impairment of earning capacity awards as they existed under an earlier statute and this award, but also finds that there are differences which are

material to this claim. The language quoted makes it plain that the award must be made in an equitable manner, without merely focusing on a demonstration of an economic impact. Additionally, the nature of the Injured Worker's facial disfigurement is such that, should she in the future seek employment, it would impair her opportunity to obtain employment. The Employer did not point to any authority that a determination that the Injured Worker had removed herself from the workforce would bar this award, and in any event the nature of the award she has received does not permanently bar her consideration of an attempt to return to the workforce as social security disability does provide for an Injured Worker to make such an attempt if future facts and circumstances make this possible.

In light of these factors, the Staff Hearing Officer finds that the Injured Worker's receipt of this social security benefit does not act as a bar to an award of facial disfigurement compensation.

{¶27} 10. On November 20, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of October 28, 2009.

{¶28} 11. On January 21, 2010, the three-member commission mailed an order denying relator's request for reconsideration.

{¶29} 12. On June 21, 2010, relator, Weyerhaeuser Company fka Willamette Industries, Inc., filed this mandamus action.

Conclusions of Law:

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

{¶31} R.C. 4123.57(B) states in 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.

{¶32} Former R.C. 4123.57(A) provided for compensation for impairment of earning capacity ("IEC"). It is well-settled that IEC compensation cannot be paid absent a post-injury desire to work. *State ex rel. CPC Group, General Motors Corp. v. Indus. Comm.* (1990), 53 Ohio St.3d 209; *State ex rel. Pauley v. Indus. Comm.* (1990), 53 Ohio St.3d 263.

{¶33} A lack of a job search can indicate the absence of a desire to earn where the IEC claimant remains unemployed, yet able to work. *State ex rel. Backus v. Indus. Comm.*, 91 Ohio St.3d 251, 2001-Ohio-32.

{¶34} In *State ex rel. Horsley v. Conrad*, 10th Dist. No. 02AP-22, 2002-Ohio-5790, the claimant, Marty L. Horsley, applied for IEC compensation. The commission denied Horsley IEC compensation on grounds that his failure to seek employment indicated a lack of desire to earn that bars IEC compensation. Allegedly, Horsley did not seek employment because he was receiving Social Security Disability Benefits ("SSD") compensation.

{¶35} Citing *Horsley*, relator contends that R.C. 4123.57(B) compensation for facial disfigurement is similar to IEC compensation in that both types of compensation cannot be paid absent a desire to earn. According to relator, claimant's receipt of SSD compensation indicates that she has removed herself from the workforce and therefore is ineligible for an award for facial disfigurement.

{¶36} Furthermore, while the statute provides that "it is not material whether the employee is gainfully employed * * * at the time of the administrator's determination," relator asserts that the proviso does not negate the alleged prerequisite that the claimant currently desires to earn.

{¶37} The magistrate disagrees with relator's proposition that a current desire to work or earn is a prerequisite to an award for facial disfigurement.

{¶38} If the meaning of a statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary. *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 1997-Ohio-310. Unambiguous statutes are to be applied according to the plain meaning of the words used. *Id.* Courts are not free to delete or insert other words. *Id.*

{¶39} It can be observed that the statute provides compensation only for "serious" facial or head disfigurement. What does the statute mean by "serious." Clearly, the answer is provided in the very sentence in which the word appears. A disfigurement is "serious" when it "either impairs or may in the future impair the opportunities to secure or retain employment." Current impairment of the opportunity to secure employment is not a prerequisite because even opportunity impairment that may occur in the future is enough to define the disfigurement as serious.

{¶40} Clearly, there is no language in the statute that indicates that a disfigurement award is to compensate for impairment of earning capacity, as relator claims. To agree with relator's claim would require this court to insert words into the statute that are not there. This court is not free to do that. *Burrows.*

{¶41} Given the above analysis, the magistrate must conclude that a disfigurement award is akin to a damage award and is not intended to compensate for loss of earnings. See *State ex rel. Latino v. Indus. Comm.* (1968), 13 Ohio St.2d 103.

{¶42} Accordingly, for all 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).