



under R.C. 4123.57(B) for the alleged loss of the whole left thumb, and to enter an order granting that compensation.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. Relator filed objections to the magistrate's decision. In his first objection, relator contends that, while the magistrate determined correctly that the commission applied the wrong legal standard, the magistrate erred by re-weighting the evidence and denying the writ.

{¶3} R.C. 4123.58(B) requires compensation when a claimant has lost the use of his thumb, and provides that the loss of more than one-half of the thumb is equal to the loss of the whole thumb. Important for our purposes here, R.C. 4123.57(B) also authorizes payment "[f]or ankylosis (total stiffness of) \* \* \* which makes any of the fingers, thumbs, or parts of either useless." *Id.*

{¶4} Here, although relator claimed a total loss of his left thumb due to ankylosis, the staff hearing officer ("SHO") did not make a finding of whether ankylosis rendered more than one-half of the thumb useless. Instead, the SHO found that, while relator had shown ankylosis, relator had not met "the second requirement of uselessness of the finger as a result of the ankylosis found. [SHO] relies upon the 12/14/2006 report and opinions of Dr. Berkowitz specifically the part where Dr. Berkowitz opined that [relator] has some range of motion in his left thumb and the left thumb is not useless."

{¶5} The magistrate agreed with relator that the SHO did not make the determination required by R.C. 4123.57(B). Nevertheless, the magistrate concluded that a writ of mandamus was not required because the medical status of the thumb was not in dispute, and the evidence showed that relator had not suffered more than a one-half loss of use.

{¶6} We agree with the magistrate and relator that the SHO did not articulate the correct standard under R.C. 4123.57(B) where ankylosis is proven. The statute provides that the loss of more than one-half of a thumb is equal to the loss of the whole thumb, and it requires payment where ankylosis renders a thumb, or any part of the thumb, useless. Together, these provisions require the commission, where ankylosis is proven, to determine whether a claimant has lost more than half the use of a thumb, not just whether a thumb is "useless," in order to determine whether a total loss has occurred. Here, while the SHO determined that the thumb was not entirely useless, the SHO did not expressly find that claimant had lost more than half of its use.

{¶7} Having determined that the SHO did not make the required finding, we decline to evaluate and interpret the medical evidence in order to do so. See *State ex rel. LTV Steel Co. v. Indus. Comm.*, 88 Ohio St.3d 284, 287, 2000-Ohio-328 (the commission has the exclusive authority to evaluate the evidence). Therefore, we sustain relator's first objection. Relator's remaining objections are moot, and we need not address them.

{¶8} Based on our independent review of the magistrate's decision, we adopt the magistrate's findings of fact as our own, but decline to adopt the magistrate's

conclusions of law. We grant a writ of mandamus ordering the commission to vacate its order denying scheduled-loss compensation to relator and to re-evaluate his application in accordance with this decision and law.

*First objection sustained,  
writ of mandamus granted.*

KLATT and SADLER, JJ., concur.

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**A P P E N D I X**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Dario Rodriguez,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-910
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and City of Lorain,	:	
	:	
Respondents.	:	
	:	

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MAGISTRATE'S DECISION

Rendered on June 9, 2009

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*Philip J. Fulton Law Office, Michael P. Dusseau and William A. Thorman, III, for relator.*

*Richard Cordray, Attorney General, and Charissa D. Payer, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS

{¶9} In this original action, relator, Dario Rodriguez, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his motion for R.C. 4123.57(B) scheduled-loss compensation

for the alleged loss of the whole left thumb, and to enter an order granting said compensation for loss of the whole left thumb.

Findings of Fact:

{¶10} 1. On February 11, 2002, relator injured his left thumb in the course of and arising out of his employment with respondent City of Lorain. The industrial claim (No. 02-319514) is allowed for "sprain or strain left thumb; aggravation of pre-existing osteoarthritis of the left MP joint of the thumb."

{¶11} 2. On March 28, 2006, relator underwent a fusion of the metacarpophalangeal ("MP") joint of his left thumb. The surgery was performed by E. Lorraine Doyle, M.D., who issued an operative report. In the operative report, Dr. Doyle states: "A 30 millimeter Synthes headless screw was then placed across the MP fusion site."

{¶12} 3. Dr. Doyle also completed form C-196 of the Ohio Bureau of Workers' Compensation ("bureau") captioned "Amputation/Loss of Use Diagram[,] Left Hand Posterior (Dorsal) View." On the form, Dr. Doyle indicates the placement of the screw across the MP fusion site.

{¶13} 4. In September 2006, relator moved for R.C. 4123.57(B) scheduled-loss compensation for the alleged "total loss of use" of his left thumb.

{¶14} 5. On December 11, 2006, at the bureau's request, relator was examined by Mark S. Berkowitz, M.D. In his two-page narrative report dated December 14, 2006, Dr. Berkowitz responded to three queries. His three responses are as follows:

\* \* \* The left thumb is not useless, and he does not have a total permanent loss of use of his left thumb. He does have range of motion in the IP joint of the left thumb with 15 degrees of dorsiflexion and 30 degrees of volar flexion. Although the MP joint is fused, range of motion of the first CMC joint is from 0 to 30 degrees and abduction of the left thumb is 0 to 35 degrees. He is able to oppose his left thumb to his index finger and his middle finger.

\* \* \*

\* \* \* [T]here is adequate range of motion in the IP joint of the thumb and in the first CMC joint. The abduction of the thumb is from 0 to 35 degrees. There is functional use of the left thumb in the motions as described above.

\* \* \*

\* \* \* He does not have loss of use of his left thumb. As stated previously, range of motion of the left thumb in the IP joint dorsiflexion is from 0 to 15 degrees and volar flexion 0 to 30 degrees. At the MP joint, there is a fusion and ankylosis. At the first CMC joint of the left thumb, there is 0 to 30 degrees of volar flexion, abduction from 0 to 35 degrees, and extension 0 degrees. He is able to oppose his left thumb to his index and middle fingers. Therefore, he has not sustained a loss of use of his left thumb. There is no ankylosis at the IP joint of the thumb or ankylosis at the MP [sic] joint[.] Therefore, there is no loss of use of the left thumb other than those described above[.]

{¶15} 6. On January 3, 2007, relator filed an amended motion stating: "[I]njured worker requests that this claim be total loss of left thumb, due to ankylosis." No new evidence was submitted.

{¶16} 7. Following a March 19, 2007 hearing, a district hearing officer ("DHO") issued an order denying relator's amended motion. The DHO's order explains:

The District Hearing Officer finds the medical evidence on file fails to substantiate claimant has sustained a total loss of use of the left thumb.

The District Hearing Officer finds ORC 4123.57(B) allows for an award of compensation for ankylosis (total stiffness of) or contracture (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 member or parts thereof as given for loss thereof.

The District Hearing Officer finds that while claimant has demonstrated a total fusion of the left thumb per his 03/28/2006 operative report of Dr. Doyle; 09/11/2006 amputation chart of Dr. Doyle and examination of Dr. Berkowitz dated 12/14/2006, claimant has failed to demonstrate that the fusion has rendered his left thumb useless as required by ORC 4123.57(B). The District Hearing Officer further relies upon the 12/14/2006 exam report by Dr. Berkowitz finding some range of motion of the thumb and finding claimant does not have a loss of use of the left thumb.

(Emphasis sic.)

{¶17} 8. Relator administratively appealed the DHO's order of March 19, 2007.

{¶18} 9. Following an April 20, 2007 hearing, a staff hearing officer ("SHO")

issued an order that also denies relator's amended motion. The SHO's order explains:

The order of the District Hearing Officer, from the hearing dated 03/19/2007, is modified to the following extent. The C-86, filed 01/03/2007, is denied and claimant's request for a total loss of use of the left thumb is denied.

Staff Hearing Officer finds that, R.C. 41237.57(B) [sic] has a two pronged test to have a finding of total loss of use of a finger. In this case, the claimant is requesting the total loss of use of the thumb due to ankylosis in the MP joint. The claimant has medically met this part of the statute but has failed to meet the second requirement of uselessness of the finger as a result of the ankylosis found. Staff Hearing Officer

relies upon the 12/14/2006 report and opinions of Dr. Berkowitz specifically the part where Dr. Berkowitz opined that, the claimant has some range of motion in his left thumb and the left thumb is not useless.

{¶19} 10. On May 11, 2007, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of April 20, 2007.

{¶20} 11. On October 16, 2008, relator, Dario Rodriguez, filed this mandamus action.

Conclusions of Law:

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

{¶22} R.C. 4123.57(B) provides a schedule for compensation for the loss of enumerated body parts. Pertinent here, the statute reads in part:

In cases included in the following schedule the compensation payable per week to the employee \* \* \* shall continue during the periods provided in the following schedule:

For the loss of a first finger, commonly known as a thumb, sixty weeks.

\* \* \*

The loss of a second, or distal, phalange of the thumb is considered equal to the loss of one half of such thumb; the loss of more than one half of such thumb is considered equal to the loss of the whole thumb.

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 the loss of the metacarpal bone (bones of the palm) for the corresponding thumb, or fingers, add ten weeks to the number of weeks under this division.

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.

{¶23} In *State ex rel. Riter v. Indus. Comm.* (2001), 91 Ohio St.3d 89, a case discussed by relator, Velma J. Riter broke her thumb at work. Five surgeries later, it became clear that Riter's interphalangeal joint was ankylosed and could not bend. The commission denied Riter's motion for R.C. 4123.57(B) scheduled-loss compensation for an alleged loss of use of the whole thumb.

{¶24} In *Riter*, the court made some observations regarding finger anatomy and the statute:

The statute also specifies, to some degree, how loss is measured, based on the anatomy of the affected member. For example, proceeding from the base of the finger outward, there is a metacarpophalangeal joint followed by a proximal phalanx. It continues with the proximal interphalangeal ("PIP") joint, the middle phalanx, the distal interphalangeal ("DIP") joint, and finally the third, or distal, phalanx ("DP"). Stedman's Medical Dictionary (26 Ed. 1995) 1030; University of Washington Radiology Webserver ([http://-www.rad.washington.edu/RadAnat/HandPALabelled.html](http://www.rad.washington.edu/RadAnat/HandPALabelled.html)).

\* \* \*

The thumb has one fewer joint and bone. There is no middle phalanx, and the joint connecting the proximal and distal phalanges is simply called the interphalangeal ("IP") joint. *Id.*  
\* \* \*

*Id.* at 90-91.

{¶25} Riter claimed that IP thumb ankylosis satisfied the statutory requirement for loss of the whole thumb. The commission, however, awarded Riter compensation for one-half loss of use only. Riter's petition to this court for a writ of mandamus was denied. She appealed as of right to the Supreme Court of Ohio.

{¶26} Affirming this court's judgment, the *Riter* court explained:

There is no dispute that claimant's IP joint has no range of motion due to ankylosis. We must determine whether this entitles claimant to compensation for the loss of the whole thumb. We find that it does not.

First, claimant argues that since (1) loss of the distal phalanx is statutorily equated to one-half loss of the thumb and (2) *more* than one-half loss is construed as a full loss, the loss of the IP joint is an addition that pushes claimant over the threshold. She couples this assertion with a reminder that under R.C. 4123.95, the workers' compensation statutes are to be liberally construed in a claimant's favor.

\* \* \*

Appellees' stronger argument lies in the significantly distinct functions of the thumb and fingers. Viewing the hand as a whole, there are two categories of movement of which it is capable: prehensile and nonprehensile. John Napier, *Hands* (1993 Rev. Ed.). Prehensile movements "are those in which an object, fixed or free, is held by a gripping or pinching action between the digits and the palm." *Id.* at 74. Nonprehensile movements, on the other hand, include "pushing, lifting, tapping and punching movements of the fingers, such as typewriting or working the stops of a musical instrument." *Id.*

The thumb is the key to grasping and gripping. *Id.* at 91. John Napier, one of the world's leading primatologists of the last century, has written:

"A hand without a thumb is at worst nothing but an animated fish-slice, and at best a pair of forceps whose points do not meet properly. Without the thumb, the hand is put back sixty million years in evolution terms to a stage when the thumb had no independent movement and was just another digit. One cannot emphasize enough the importance of finger-thumb opposition for human emergence from a relatively undistinguished primate background." *Id.* at 128-129.

Mechanically, the thumb "is the only digit in the hand that has this freedom to rotate or swivel; it is also unique in that all of its movements can take place independent of those of any of the other fingers; as everyone says, the combination of strength, independence and versatility sets it apart. Because of its unique capabilities \* \* \* the thumb, if need be, can carry on a solo act." Frank R. Wilson, *The Hand*, at 138-139.

The thumb's special properties derive from two sources: (1) the metacarpal bone, which proceeds from the metacarpophalangeal joint at the thumb's base, down towards the wrist, and (2) the metacarpocarpal joint at the base of the hand near the wrist. As Napier observes:

"The thumb metacarpal is unique. Alone amongst the metacarpals, it articulates by means of a freely movable saddle joint with the carpals. The remaining carpals are of the plane joint variety which have very small ranges of movement. The metacarpocarpal joint of the thumb, being of the saddle type, is almost as mobile as a ball and socket joint and has the following movements: adduction-abduction, flexion-extension and medial lateral rotation." *Id.* at 66.

Continuing, he reported:

"The functional advantage of a saddle joint is that the two opposing surfaces and their supporting ligaments are so arranged that the stability of the joint is provided without the need for a cuff of bulky muscles disposed around the joint to control and direct its movement, as is the case for other ball-

and-socket joints like the shoulder and the hip. Bulky muscles at the root of the thumb would seriously impair its manipulative skill and flexibility." *Id.*

These passages demonstrate that the thumb is truly unique and that evaluating it under standards directed at the fingers just doesn't work. The key to the thumb's uniqueness and utility lies in the metacarpal bone and metacarpocarpal joint. Thus, to say that ankylosis of the IP joint makes the thumb totally useless is wrong.

*Id.* at 91-93. (Emphasis sic.)

{¶27} Relying upon *Riter*, relator asserts that the *Riter* court "finds the MP joint to be the more important joint as it relates to the functionality and usefulness of the thumb." (Relator's brief, at 12.) Based upon that observation, relator argues:

\* \* \* If the ankylosis of the IP joint does not equate to a loss of more than one half of the thumb then basic logic dictates that ankylosis of the only other joint, the MP joint, would equal a greater than one half loss of a thumb. Therefore, under R.C. 4123.57(B), Relator's application for total loss of use of the thumb should be granted.

*Id.* at 12-13.

{¶28} Relator's argument confuses the metacarpocarpal joint, which the *Riter* court found key to the thumb's uniqueness and utility, with the MP joint that was fused in relator's industrial claim.

{¶29} Given that the MP joint, fused and ankylosed in this industrial claim, is not the joint that the *Riter* court found key to the thumb's uniqueness and utility, relator's argument is actually undermined by the *Riter* case.

{¶30} The SHO states in her order of April 20, 2007 that she is applying a two-pronged test to relator's request under R.C. 4123.57(B) for a finding of a total loss of

use of the thumb due to ankylosis. The SHO apparently finds that relator has proven ankylosis of one of the thumb joints, but the SHO nevertheless determines, based upon Dr. Berkowitz's report, that the thumb is not useless because Dr. Berkowitz found some range of motion in the left thumb.

{¶31} Relator argues that the SHO's order indicates that the SHO implied an incorrect standard for determining whether relator should be compensated for loss of his thumb. According to relator, the standard to be applied is whether relator has sustained "the loss of more than one-half of such thumb [which] is considered equal to the loss of the whole thumb," as set forth at R.C. 4123.57(B).

{¶32} The SHO determined that the thumb is not useless, but did not specifically determine whether relator has sustained the loss of more than one-half of his thumb due to fusion and ankylosis of the MP joint. Actually, the statute requires the commission to determine to what extent the thumb may be useless where ankylosis is alleged.

{¶33} Perhaps it can be said that the issue before the SHO was whether MP joint ankylosis rendered useless more than one-half of the thumb. However, that the SHO failed to specifically find that MP joint ankylosis does not render useless more than one-half of the thumb does not require this court to issue a writ of mandamus.

{¶34} There is no dispute that the MP joint is ankylosed and that such ankylosis is the sole medical basis upon which relator claims that he has sustained the loss of more than one-half of his left thumb. Moreover, commission reliance upon the report of

Dr. Berkowitz is unchallenged in this action. Thus, the medical status of the left thumb is not in dispute.

{¶35} As Dr. Berkowitz reported, while the MP joint is fused, there remains adequate range of motion in the IP joint and in the first CMC joint. Relator is able to oppose his left thumb to his index finger and middle finger. Under such scenario, relator does not have more than one-half loss of use of his left thumb. *Riter*. Because he does not have more than one-half loss of his left thumb, relator does not have a compensable loss under R.C. 4123.57(B).

{¶36} 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).