

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cambria County and Inservco	:	
Insurance Services, Inc.,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 2260 C.D. 2009
	:	
Workers' Compensation Appeal Board	:	Submitted: April 9, 2010
(Sidor),	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: June 4, 2010

Cambria County and Inservco Insurance Services, Inc. (collectively, Employer), petition this Court for review of an order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of the Workers' Compensation Judge (WCJ) granting Clay Sidor's (Claimant) Claim Petition for disfigurement, but modifying the award from 15 weeks of compensation to 40 weeks of compensation. Before this Court, Employer challenges the Board's modification of Claimant's disfigurement award.

On March 5, 2007, while in the scope of his employment as a dietary cook at Cambria County's personal care facility, Laurel Crest Manor, Claimant was involved in an accident in which he slipped into a pot of boiling water that splashed over parts of his body, causing burns to his chest, hands, and neck. (WCJ Decision, Findings of Fact (FOF) ¶¶ 3, 5.) As a result, Employer issued a Notice of Temporary Compensation Payable (NTCP), acknowledging Claimant's injury as "water burns from a steam kettle" affecting his "chest, hands, [and] neck." (NTCP, March 20, 2007, R.R. at 34a.) Claimant returned to his employment without an injury-related wage loss before filing his Claim Petition on March 10, 2008, in which he alleged "burn[s] to the anterior neck, chest and bilateral upper extremities." (Claim Petition ¶ 1, March 10, 2008, R.R. at 3a.) In the Claim Petition, Claimant requested payment for "disfigurement (scars) of head, face, or neck" and also requested counsel fees to be paid by Employer. (Claim Petition ¶ 14, R.R. at 4a.) Employer filed an answer on March 17, 2008, denying disfigurement scars to Claimant's head, face, or neck.

The WCJ conducted hearings on the matter on April 10, 2008, and September 10, 2008, at which time the WCJ viewed the "injury related changes in the skin of [Claimant]'s neck." (FOF ¶ 7.) The WCJ explained:

These changes extend from right front to left rear areas of his neck. These areas are ruddy or reddish. Their visibility varies but is everywhere consistent with [Claimant]'s normal ruddy complexion. I incorrectly referred to areas on the left front of the neck during the viewing on April 10, 2008. The injury related flushing is permanent scarring. It is everywhere visible but appears as a heightening of a normal ruddy complexion. [Claimant] submitted pictures of himself taken before his injury ([Claimant] Exhibit 5) which do not show his ruddy complexion which I observed during two hearings.

(FOF ¶ 7.) The WCJ concluded that Claimant’s “injury related scarring is serious and disfiguring within the meaning of Section 306(c)(22) of the Workers’ Compensation Act” (Act),¹ and that Claimant “is entitled to compensation for 15 weeks for his disfigurement.” (WCJ Decision, Conclusions of Law ¶¶ 1-2.) Employer appealed to the Board, and Claimant cross-appealed. Employer argued that the WCJ erred in finding Claimant’s disfigurement to be serious and disfiguring, and Claimant argued that the WCJ erred in capriciously disregarding evidence by entering an award outside the range that most WCJs would select.

The Board stated that it viewed Claimant’s scarring on February 18, 2009, nearly two years after the work-related injury occurred, and agreed with the WCJ’s description of the scarring, concluding that “[t]here is no doubt that the disfigurement is permanent and serious.” (Board Op. at 5.) However, the Board determined that the WCJ’s award of 15 weeks of compensation was “significantly outside the range most [WCJs] would award.” (Board Op. at 5.) The Board ultimately modified the WCJ’s award by awarding Claimant 40 weeks of benefits. Employer now petitions this Court for review.²

¹ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 513(22).

² This Court’s “review is limited to a determination of whether constitutional rights have been violated, whether an error of law has been committed or whether necessary findings of fact are supported by substantial evidence.” McCole v. Workers’ Compensation Appeal Board (Barry Bashore, Inc.), 745 A.2d 72, 75 n.7 (Pa. Cmwlth. 2000). Where the Board, following its own viewing of a disfiguring scar in proceedings before it, has modified a WCJ’s award, this Court will not disturb the Board’s modified award absent evidence that the Board’s award fell outside the range of awards for the type of scar involved. Western Pennsylvania Hospital v. Workers’ Compensation Appeal Board (Cassidy), 725 A.2d 1282, 1284 (Pa. Cmwlth. 1999).

On appeal, Employer argues that the Board erred in granting Claimant 40 weeks of benefits because Claimant failed to present unequivocal medical evidence in support of his claimed disfigurement. Alternatively, Employer argues that the Board erred in modifying the WCJ's award of benefits from 15 weeks of compensation to 40 weeks of compensation because the Board failed to clearly articulate the WCJ's alleged incorrect description of Claimant's disfigurement or adequately explain the range of what most WCJs in the Commonwealth would award.

Section 306(c)(22) of the Act provides compensation for "serious and permanent disfigurement of the head, neck or face, of such a character as to produce an unsightly appearance, and such as is not usually incident to the employment." 77 P.S. § 513(22). In order to receive workers' compensation benefits for this type of disfigurement, "a claimant must prove that the disfigurement (1) is serious and permanent, (2) results in an unsightly appearance and (3) is not usually incident to his or her employment." McCole v. Workers' Compensation Appeal Board (Barry Bashore, Inc.), 745 A.2d 72, 76 (Pa. Cmwlth. 2000).

Employer argues that the Board erred in granting Claimant 40 weeks of workers' compensation benefits because Claimant failed to present unequivocal medical evidence in support of his alleged disfigurement. Employer contends that Claimant presented equivocal medical evidence in the form of an undated report by Paul Rollins, M.D., F.A.C.S., who is Claimant's treating plastic and reconstructive surgeon. Employer argues that Dr. Rollins' report refutes Claimant's disfigurement allegations because Dr. Rollins states that "[i]n my opinion [Claimant] does not have any permanent disfigurement from the burns. He may have some residual scar tissue

related to the burns. These however would be mainly in the form of pigment changes on his skin. These changes most likely would only be minor.” (Letter from Dr. Rollins to Claimant’s Attorney (undated), R.R. at 58a.) However, contrary to Employer’s contention, Claimant need not present unequivocal medical evidence to prove a permanent disfigurement under this Court’s precedent.

In American Chain & Cable Co. v. Workmen’s Compensation Appeal Board (Weaver), 454 A.2d 211 (Pa. Cmwlth. 1982), this Court explained:

In any disfigurement case, the [WCJ] inevitably bases his findings of fact and determination of compensability on his personal observation of the scarring or damage to the normal appearance of the claimant. Unlike other compensable injuries disfigurement is not best determined by expert medical testimony or by testimony from witnesses describing what the claimant’s disfigurement looks like. Rather, it is the physical appearance of the claimant himself which constitutes the evidence considered by the [WCJ].

Id. at 214 (citation omitted). Moreover, in McCole, this Court stated that, “[g]enerally, competent medical evidence is necessary to support a finding of fact that disfigurement is permanent. However, we have held ‘that medical evidence is not necessary to support a finding of permanence where circumstances permit the fact-finder to determine from his own observations whether the disfigurement is permanent.’” McCole, 745 A.2d at 76 (citation omitted) (quoting Purex Corp. v. Workmen’s Compensation Appeal Board (Ross), 445 A.2d 267, 269 (Pa. Cmwlth. 1982), overruled in part on other grounds by, American Chain & Cable, 454 A.2d at 213-214). See also Carlettini v. Workers’ Compensation Appeal Board (City of Philadelphia), 714 A.2d 1113, 1115 (Pa. Cmwlth. 1998) (medical evidence was not necessary where the WCJ viewed the claimant nine months after the injury and the

Board viewed the claimant nearly twenty-three months after the injury); City of Philadelphia, Risk Management Division v. Workmen's Compensation Appeal Board (Harvey), 690 A.2d 1293, 1297-98 (Pa. Cmwlth. 1997) (medical evidence was not necessary where the WCJ viewed the claimant's scars four months after the work-related injury and the Board viewed claimant's scars nineteen months after the work-related injury); Koppers Co. v. Workmen's Compensation Appeal Board (Martin), 471 A.2d 176, 177 n.3 (Pa. Cmwlth. 1984) (medical evidence was not necessary where the WCJ viewed the scar six months after the injury and the Board viewed the scar eleven months after the injury).

Here, the WCJ viewed Claimant's scars on two occasions, April 10, 2008, and September 10, 2008, nearly one year and one-and-a-half years after the work-related injury occurred, respectively. Additionally, the Board viewed Claimant's scars on February 18, 2009, nearly two years after the work-related injury occurred. Thus, unequivocal medical evidence was not necessary to prove that Claimant suffered from a permanent disfigurement because, based on the viewing, the WCJ found that "[t]he injury related flushing is permanent scarring." (FOF ¶ 7.)

Next, Employer argues that the Board erred in modifying the WCJ's award of benefits from 15 weeks of compensation to 40 weeks of compensation. On appeal from a WCJ's decision, the Board must review the WCJ's "[t]ranslation of the visual impact of a disfigurement into a monetary award" on the basis of its own view of a claimant's condition. Hastings Indus. v. Workmen's Compensation Appeal Board (Hyatt), 531 Pa. 186, 192, 611 A.2d 1187, 1190 (1992). "The 'only meaningful way' for the [Board] to determine whether the WCJ's opinion is supported by substantial

evidence is for the [Board] to view the scar.” McCole, 745 A.2d at 76 (quoting American Chain & Cable, 454 A.2d at 214). Permitting the Board this type of review allows it to use its experience, serves to “promot[e] a reasonable degree of uniformity” and “assur[es] evenhandedness” in awarding disfigurement benefits throughout the Commonwealth. Hastings, 531 Pa. at 192, 611 A.2d at 1190. “Accordingly, the Board may modify a WCJ award only if it concludes after conducting its own view that the WCJ capriciously disregarded competent evidence by entering an award significantly outside the range of benefits that most WCJs would select for a particular scar.” City of Pittsburgh v. Workers’ Compensation Appeal Board (McFarren), 950 A.2d 358, 360 (Pa. Cmwlth. 2008). However, this Court, in City of Pittsburgh, explained that “[i]n so concluding, the Board must adequately explain its increase of an award to allow for meaningful appellate review.” Id. We further explained that an adequate explanation is defined as indicating “what range is acceptable under [the] circumstances, what most WCJs would award within that range or how the [Board] reached its conclusion that most WCJs would award greater compensation.” Id. at 360-61 (quoting City of Philadelphia v. Workers’ Compensation Appeal Board (Doherty), 716 A.2d 704, 707 (Pa. Cmwlth. 1998)).

Relying on Dart Container Corp. v. Workers’ Compensation Appeal Board (Lien), 959 A.2d 985 (Pa. Cmwlth. 2008), Employer contends that the Board erred in increasing the award because the Board failed to clearly articulate its basis for disputing the WCJ’s description of Claimant’s disfigurement or adequately explain the range of what most WCJs in the Commonwealth would award. In Dart Container, this Court vacated an order of the Board, which modified a grant of compensation

benefits for an unsightly disfigurement from 22 weeks of benefits to 70 weeks of benefits and remanded the matter for further proceedings because “the Board did not describe [the claimant]’s scar, did not state whether it rejected the WCJ’s description and did not explain why most WCJs would award benefits within the 60 to 75 weeks’ range.” Id. at 989.

Here, the Board modified the amount of weeks that Claimant is entitled to benefits for his disfigurement from 15 weeks to 40 weeks, explaining that:

The [WCJ] described Claimant’s scar, which he personally observed on April 10, 2008 and September 10, 2008. His final viewing of the scar occurred approximately 18 months after the incident. We viewed the scar on February 18, 2009, nearly two years after the incident. There is no doubt that the disfigurement is permanent and serious. Furthermore, although *we agree with the [WCJ]’s description of the scarring, we believe that the [WCJ]’s award was significantly outside the range most judges would award.* While every case is judged on its own merits, *claimants with similar complexions sustaining similar disfigurements around the Commonwealth typically receive between 30 and 50 weeks of benefits. This determination is based upon the extensive experience we have reviewing decisions from throughout the Commonwealth. Therefore, we will modify the [WCJ]’s award to reflect an award of 40 weeks of benefits, as the average award for this type of disfigurement.*

(Board Op. at 4-5 (emphasis added).) We disagree with Employer that the Board did not comply with Dart. First, the Board “agree[d]” and accepted the WCJ’s description of Claimant’s scar, (Board Op. at 5), and, therefore, did not need to describe it. The WCJ’s description of the scar, which the Board adopted, indicates that the scar: is on the front and rear of Claimant’s neck, is permanent; and is serious and visible. Second, the Board explained why most WCJs would award benefits in the 30 to 50 week range: the Board highlighted the ruddy or reddish complexion of

Claimant and compared his scar with similar disfigurements. Third, the Board explained that it chose 40 weeks because that is the average number of weeks awarded for the type of disfigurement that Claimant exhibited. Finally, the Board explained that it reached its determination based on its experience in reviewing WCJ decisions from throughout the Commonwealth. Unlike WCJs who view scars and disfigurements in a localized area, the Board, on the other hand, comprises multiple Commissioners who have the benefit and experience of viewing scars and awards in appeals from WCJ decisions statewide. The Board is not required to cite to other WCJ or Board awards in cases with similar disfigurements or utilize written guidelines prescribing specific periods of compensation for each type of disfigurement. Rather, this Court noted in General Motors Corp. v. Workers' Compensation Appeal Board (McHugh), 845 A.2d 225, 230 (Pa. Cmwlth. 2004), that it is the Board's duty to promote reasonable uniformity in disfigurement awards throughout the state and that, in an attempt to do so, the Board may rely on its own expertise.

Concluding that the Board did not err, we affirm.

RENÉE COHN JUBELIRER, Judge

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	:	
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ORDER

NOW, June 4, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge