

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

DANNY HODGSON,)	
)	
Employee-Appellant,)	
)	
v.)	
)	C.A. No. N11A-07-007 DCS
CHRYSLER GROUP LLC,)	
)	
Employer-Appellee.)	

Submitted: January 26, 2012
Decided: April 25, 2012

*On Appeal from the Industrial Accident Board of the State of Delaware
In and For New Castle County*
REVERSED AND REMANDED

OPINION

Appearances:

Robert P. LoBue, Esquire, Wilmington, Delaware
Attorney for Appellant Danny Hodgson

Robert M. Greenberg, Esquire, Wilmington, Delaware
Attorney for Chrysler Group LLC

**DIANE CLARKE STREETT
JUDGE**

Factual and Procedural Background

In October 2002, Appellant Danny Hodgson, (“Hodgson”), suffered a compensable work-related injury when he was working on the assembly line at Chrysler Group LLC, (the “Employer”). The injury occurred when a car part hit Hodgson in the face, cut him, and left a one and one eighth inch scar from his nostril to his upper lip. The scar is white and measures about one eighth to one sixteenth inches wide. The scar also prevents growth of facial hair in the moustache area of his face. After a hearing on Hodgson’s Petition to Determine Disfigurement, the Industrial Accident Board, (the “Board”), awarded Hodgson ten weeks of compensation for the scar. This is Hodgson’s appeal of that decision.

At the hearing on June 9, 2011, Hodgson presented his facial scar so that the Board could measure it and rate its appearance. Hodgson also presented three other scars on his arms that resulted from a separate work-related injury in 2008. (Hodgson is not herein contesting the Board’s disfigurement award for these scars on his arms.) Hodgson also testified the he is embarrassed all of the time due to his facial scar and that people (including his grandchildren) comment on it and ask how it happened. He further stated that the attention that the scar brings causes him to reflect on the accident time and time again.

On June 15, 2011, the Board found that Hodgson’s facial scar was blatantly apparent, visible to casual glances, white, distinct, and ugly. The Board further

found that the scar would bring a significant amount of social and psychological embarrassment. The Board also stated that Hodgson's other three scars on his arms were "comparatively minor and . . . cause [Hodgson] far less embarrassment than the facial scar."¹ Consequently, the Board awarded Hodgson ten weeks of benefits for his facial disfigurement on a scale from zero to 150 weeks.

Contentions of the Parties

Hodgson asserts that the Board's award of ten weeks of compensation for his facial disfigurement is not proper and equitable compensation. The Employer contends that the Board's decision is not arbitrary, capricious or unreasonable and is based on substantial evidence. The Employer further argues that Hodgson's appeal should be dismissed due to a late filed brief.

Standard of Review

The Court reviews the Board's decision to determine if substantial evidence exists in the record to support the Board's findings of fact and to determine if the Board erred in its application of the law.² Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³

¹ Record of the Proceedings, Decision on Petition to Determine Disfigurement, p. 4 (hereinafter the "Board's Decision").

² *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *Shively v. Allied Systems, Ltd.*, 2010 WL 537734, *9 (Del. Super. 2010).

³ *Anchor Motor Freight*, 716 A.2d at 156; *Shively*, 2010 WL 537734 at *9.

Thus, the Court, in its review of the Board's decision, does not weigh the evidence or make factual findings but only determines if substantial evidence exists upon which the Board's factual findings can be legally supported.⁴ The Court shall not overturn the factual findings of the Board except where no satisfactory evidence exists to sustain the findings.⁵

In addition, the Court "consider[s] the record in the light most favorable to the prevailing party below."⁶

However, the Court reviews questions of law *de novo*.⁷

Discussion

Hodgson's Delinquent Brief

The Court may in its discretion dismiss a proceeding if any brief is not filed within the time required by the Rules or in accordance with any order of the Court.⁸

The Court initially ordered Hodgson to submit an opening brief by October 31, 2011. Hodgson did not do so, and the Court issued a delinquent brief notice stating that the matter would be dismissed unless action was taken within ten days of November 4, 2011. Hodgson filed an opening brief on November 9, 2011, within the requested ten days. In his reply brief, Hodgson further apologized and

⁴ *Day & Zimmerman Sec. v. Simmons*, 965 A.2d 652, 656 (Del. 2008).

⁵ *Bustos v. Castle Const. of Delaware, Inc.*, 2005 WL 2249762, *2 (Del. Super. 2005).

⁶ *Shively*, 2010 WL 537734 at *9.

⁷ *Anchor Motor Freight*, 716 A.2d at 156; *Shively*, 2010 WL 537734 at *9.

⁸ See Super. Ct. Civ. Rule 107(f).

provided the Court with cause as to why his opening brief was late. Furthermore, Hodgson's reply brief was filed on November 30, 2011, which was before the deadline of December 7, 2011, ordered in the Court's original briefing schedule. Thus, since no ultimate delay resulted from Hodgson's delinquent opening brief, the Court in its discretion will consider the appeal on its merits.

The Board Erred When It Failed to Appropriately Analyze the Comparative Severity of Hodgson's Disfigurement.

Delaware workers' compensation law provides for "proper and equitable compensation for serious and permanent disfigurement to any part of the human body up to 150 weeks, provided that such disfigurement is visible and offensive when the body is clothed normally."⁹ In determining an award for disfigurement, the Industrial Accident Board must specify the following four factors:

- 1) Size, shape and location of the disfigurement;
- 2) Social and psychological impact of the disfigurement;
- 3) Comparative severity of the disfigurement; and
- 4) Other relevant matters.¹⁰

The comparative severity of a disfigurement is determined by comparing the disfigurement to other disfigurements of a similar size, shape and location that

⁹ 19 Del.C. § 2326(f).

¹⁰ *Martinez v. General Metalcraft, Inc.*, 919 A.2d 561, *2 (TABLE) (Del. Feb. 21, 2007) (citing *Colonial Chevrolet v. Conway*, 1980 Del. Super. LEXIS 145 (Del. Super. Apr. 28, 1980)); *Redmile v. Pathmark Stores, Inc.*, 1999 WL 743527, *4 (Del. Super. July 23, 1999) (citing *Hatzel & Buehler v. Martin*, Del. Super., C.A. No. 80A-AP-11, Walsh, J., (Feb. 6, 1981) (Let. Op.) at 3).

have been previously observed by the Board in its accumulated experience.¹¹ For example, in *Martinez v. General Metalcraft, Inc.*,¹² the Supreme Court upheld the Board's findings where a disfigurement, consisting of varicose veins on the claimant's left leg, was compared to a similar disfigurement—that of varicose veins on the claimant's right leg.¹³ Furthermore, scars on the face are generally more noticeable than other scars and are deserving of a larger award.¹⁴ Due to the extremely subjective nature of determining a disfigurement's comparative severity, the Board is required to support its decision with particular reasons as to why the disfigurement is comparatively severe.¹⁵ Such reasons could include, for example, whether the scar by its very location should be given a higher severity rating.¹⁶

In this matter, the Board made appropriate factual findings as to the size, shape and location of Hodgson's facial scar. The Board also properly addressed the social and psychological impact that the scar has had on Hodgson's life.

However, when discussing the comparative severity of the disfigurement, the Board's decision does not reveal a comparison of Hodgson's facial scar with other scars of similar size, shape and location (the face) that the Board has

¹¹ *Roberts v. Capano Homes, Inc.*, 1999 WL 1222699, *1-3 (Del. Super. Nov. 8, 1999); see e.g. *Martinez*, 919 A.2d 561.

¹² 919 A.2d 561.

¹³ *Martinez*, at *4.

¹⁴ See *Id.* at *3.

¹⁵ *Redmile*, at *4 (citing *Hatzel & Buehler* at 3).

¹⁶ *Id.*

observed in its accumulated experience.¹⁷ Instead, the Board compared the severity of Hodgson’s facial scar with the severity of the scars on his arms which were minor in comparison. This amounts to legal error. The scars which formed the basis for the Board’s severity comparison were on Hodgson’s arms and were “insignificant.”¹⁸ These arm scars do not amount to disfigurements of a similar size, shape and location that have been observed by the Board in its accumulated experience and, therefore, they cannot form a basis for comparison to determine the degree of severity of Hodgson’s facial disfigurement. The Board’s decision lacks an appropriate comparative analysis.

Thus, the Board erred as a matter of law when it based its award for Hodgson’s disfigurement upon a comparison between the severity of the facial disfigurement and the severity of Hodgson’s other minor scars on his arms.

ACCORDINGLY, the Board’s decision is ***REVERSED and REMANDED for factual findings as to the comparative severity of the disfigurement in conformance with this opinion.***

IT IS SO ORDERED.

Judge Streett

Original to Prothonotary

¹⁷ “The IAB is required to explicitly state the facts upon which its decisions are based.” *Martinez*, at *3 (citing *Pollard v. Placers Inc.*, 1996 WL 527307 (Del. Super. May 20, 1996)).

¹⁸ Board Decision at 4.