

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dart Container Corp.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1323 C.D. 2009
	:	
Workers' Compensation Appeal	:	Submitted: December 18, 2009
Board (Lien),	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: January 29, 2010

This workers' compensation case, which concerns the Workers' Compensation Appeal Board's (Board) increase of a Workers' Compensation Judge's (WCJ) award of benefits on a disfigurement claim, returns to us after remand in Dart Container Corp. v. Workers' Compensation Appeal Board (Lien) (Dart Container I), 959 A.2d 985 (Pa. Cmwlth. 2008). In this second appeal, Dart Container Corp. (Employer) asserts the Board erred in modifying the WCJ's award because the record does not support a finding the WCJ capriciously disregarded evidence in rendering the award and because the Board did not adequately explain the basis for its modification.¹ Discerning no merit in these assertions, we affirm.

¹ By order dated December 8, 2009, this Court precluded Respondent from filing a brief in this matter.

As set forth in Dart Container I, the facts that give rise to this appeal are as follows. In October 2002, Claimant suffered a neck and back injury while working for Employer. Pursuant to a notice of compensation payable, she received \$331.00 in weekly total disability benefits based on an average weekly wage of \$450.99. Claimant underwent cervical spine surgery that left a scar on her neck and later filed a review petition for disfigurement benefits. In awarding disfigurement benefits, the WCJ found:

3. At the hearing of May 22, 2007 this [WCJ] observed the scar. From approximately 15-20 feet this [WCJ] readily saw a scar estimated to be 1 1/2" long and a 1/4" wide from the center of Claimant's neck and going to the right. The scar was red and appeared to be in a straight line at that distance. This [WCJ] then observed the scar at approximately one foot away and measured it to be 1 1/4" long and 1/4" wide. The scar was pink or red and in a straight line. Upon very close inspection at approximately six inches, this [WCJ] confirmed that the scar branches into two small lines, like a letter "Y", though this division of the scar into two small lines was not immediately noted by this [WCJ]. This [WCJ] described the disfigurement as "a classic cervical scar." (N.T. 5/22/07 pg. 8)

4. Claimant was born on November 9, 1969, and this [WCJ] noted that she appears fairly young and does not have any other lines or creases about her face or neck.

5. This [WCJ] finds that Claimant suffered permanent unsightly disfigurement on her neck as a result of the work injury for which Claimant is entitled to twenty-two weeks of compensation at her maximum rate.

WCJ Op., 7/9/07, Findings of Fact (F.F.) Nos. 3-5. Claimant appealed the WCJ's

order, asserting the award was low and was outside the range most WCJs would select. The Board agreed, stating:

Claimant appeared before us at oral argument The visual impact of her disfigurement, the location and relative severity of her scarring, and the interests of uniformity in disfigurement awards, warrant a determination that the WCJ's award of twenty-two weeks of compensation was below the proper range of benefits, which other WCJ's would award for similar disfigurements. Based on our experience, the range of awards that most WCJ's would select for comparative compensable disfigurement is between 60 and 75 weeks.

In General Motors Corp. v. [Workers' Compensation Appeal Board] (McHugh), 845 A.2d 225 (Pa. Cmwlth. 2004), the Court observed that we have a duty to enter an award, based on our experience, that is reasonably uniform with awards in similar disfigurement cases throughout Pennsylvania, and rejected any reliance on "rule of thumb" guidelines in a workers' compensation treatise. Instead, the Court described our use of experience as a valuable function in providing uniformity in disfigurement cases. Therefore, based on our own observations and experience, we modify the WCJ's award to reflect 70 weeks of compensation for serious and permanent disfigurement caused by the scar on Claimant's neck.

Bd. Op., 2/27/08, at 5.

Employer appealed to this Court, arguing, among other things, the Board did not adequately explain its basis for modifying the WCJ's award. Ultimately, we agreed, stating that although the Board considered the visual impact of Claimant's disfigurement, its location and relative severity, the Board did not describe Claimant's scar, did not state whether it rejected the WCJ's description

and did not explain why most WCJs would award compensation within the 60 to 75 weeks' range. As such, we remanded to the Board for an adequate explanation of its decision to modify the WCJ's award. We also noted that in our decision in City of Pittsburgh v. Workers' Compensation Appeal Board (McFarren), 950 A.2d 358 (Pa. Cmwlth. 2008), this Court "did not require the Board to cite written guidelines or other awards to support its modification and will not do so here." Dart Container I, 959 A.2d at 988; see also DPW/Norristown State Hosp. v. Workers' Comp. Appeal Bd. (Reichert), 858 A.2d 693, 696 (Pa. Cmwlth. 2004) ("there are no binding written guidelines prescribing specific periods of compensation for each type of disfigurement, and we decline [the employer's] invitation to prescribe such periods or to offer any additional guidance on this issue as such is a matter within the province of our legislature.") (citation omitted) (emphasis deleted).

After remand, the Board reached the same result, again modifying the WCJ's award of disfigurement benefits to provide for an award of 70 weeks. Again, Employer appealed to this Court.

On appeal,² Employer contends the Board erred in modifying the WCJ's order and increasing Claimant's disfigurement award from 22 weeks to 70 weeks and, therefore, the Board's order should be reversed.

² Our review is limited to determining whether necessary findings were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Minicozzi v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005).

Specifically, Employer argues the Board erred in modifying the WCJ's disfigurement award because the Board never found the WCJ capriciously disregarded competent evidence by awarding Claimant 22 weeks of disfigurement benefits for a "classic cervical scar" that is "1¼" long and ¼" wide." See Hastings Indus. v. Workmen's Comp. Appeal Bd. (Hyatt), 531 Pa. 186, 611 A.2d 1187 (1992); City of Phila. v. Workers' Comp. Appeal Bd. (Doherty), 716 A.2d 704 (Pa. Cmwlth. 1998). Moreover, Employer asserts, there is nothing in the Board's decision or in the record that would support a determination of capricious disregard by the WCJ. As a result, Employer contends, the Board improperly modified the WCJ's award.

Further, Employer maintains the Board erred in modifying the WCJ's disfigurement award, where it accepted the WCJ's description of the scar, because it failed to adequately explain its increase of the award to allow for meaningful appellate review. See City of Pittsburgh. Specifically, Employer argues, the Board failed to follow this Court's instruction on remand and did not adequately explain why most WCJs would render an award within the 60 to 75 weeks' range. Instead, it asserts, the Board reiterated its reliance on "experience," without any further explanation. Employer contends that because the Board failed to adequately explain the reason for its modification, it did not provide any basis upon which this Court can conduct any meaningful review.

Employer further maintains this Court already provided the Board with a remand opportunity to present an adequate explanation for its modification of the disfigurement award. It asserts the Board failed to do so. Employer

contends it is clear then that the Board's decision cannot support modification of the WCJ's award. As a result, Employer argues this Court should reverse the Board's order and reinstate the WCJ's original disfigurement award.

The seminal case in the area of disfigurement awards is our Supreme Court's decision in Hastings. There, the Court considered the proper "scope of review" for the Board in a disfigurement case. The claimant suffered work-related facial scarring for which a referee awarded 17 weeks of compensation. On appeal, the Board viewed the scar and determined that the referee's description of the scar was accurate, but the award of 17 weeks' compensation constituted a capricious disregard of competent evidence. Thus, the Board amended the award to provide for 50 weeks of compensation, stating the increase was necessary to achieve uniformity among referees in the state. Ultimately, our Supreme Court upheld the Board's award. The Court explained the Board's role in disfigurement cases as follows:

The amount of the award in a disfigurement case is ... a legal determination or is at least a mixed question of fact and law, and as such is subject to review by the [Board].

Translation of the visual impact of a disfigurement into a monetary award involves a legal element which is subject to review by the [Board] on the basis of its own view of a claimant's visage. ...

We hold, therefore, that a referee's compensation award in a disfigurement case is not purely a question of fact subject to the rule ... applicable to loss of use cases; if the [Board] concludes, upon a viewing of a claimant's disfigurement, that the referee capriciously disregarded competent evidence by entering an award significantly outside the range most referees would select, the [Board] may modify the award as justice may require.

Id. at 191-92, 611 A.2d at 1190.

More recently, in City of Pittsburgh, this Court reviewed a Board decision, which increased a WCJ's disfigurement award from six weeks to thirty-five weeks for a cervical scar sustained by a claimant. There, the Board viewed the claimant's scar for its location, length, appearance and overall severity and accepted the WCJ's description of the scar. The Board determined most WCJs would award between 30 to 40 weeks of compensation for the scar and concluded the WCJ erred by entering an award below that range; thus, the Board increased the award to 35 weeks. On the employer's appeal, this Court determined the Board failed to adequately explain its decision to modify the WCJ's award. We stated:

After reviewing the record, the Court cannot conclude that the Board adequately explained its modification of the disfigurement award. [Lord & Taylor v. Workers' Compensation Appeal Board (Bufford), 833 A.2d 1223 (Pa. Cmwlth. 2003)]; City of Philadelphia. The Board viewed [the claimant's] scar and accepted the WCJ's description of the scar Although the Board accepted this characterization of the scar ... it nonetheless increased the award from six weeks to thirty-five weeks with no explanation other than that the proper range for the scar is thirty to forty weeks of compensation benefits. In furtherance of the goal of promoting statewide uniformity, the Board must explain how it determined that WCJs would select thirty to forty weeks of benefits for a surgical scar of one inch in visible length that was slight in its severity. The Board failed to do so here. ...

While the Board may not be bound by a local rule of thumb, the Board should provide an explanation for its decision to increase the disfigurement award to allow the Court to determine whether the Board's decision is compatible with the goal as announced in Hastings. The Court is unable to review, without further explanation,

whether the Board's modification of [the claimant's] award would promote statewide uniformity for similar disfigurement cases. Lord & Taylor.

Accordingly, the Court must vacate the Board's order and remand this matter to the Board to explain adequately its decision to increase the disfigurement award from six weeks to thirty-five weeks of benefits under these circumstances. The Board should explain how it determined the acceptable range of disfigurement benefits for [the claimant's] scar, where it does not dispute the WCJ's description, and should explain what most WCJs would award within the range deemed acceptable by the Board. It further should explain the grounds upon which it relied to reach the conclusion that most WCJs throughout the state would award more than six weeks of disfigurement benefits allowed by the WCJ in the matter *sub judice*. After the Board adequately explains its modification of the WCJ's disfigurement award, the Board very well may reach the same or a similar conclusion. That determination, however, is left to the Board upon remand.

Id. at 361-62.

In Dart Container I, this Court, relying on City of Pittsburgh, remanded this case to the Board, stating:

In the case *sub judice*, the Board considered the visual impact of [Claimant's] disfigurement, its location and relative severity of her scarring and explained that based upon its experience the range that most WCJs would select for a similar scar is between 60 to 75 weeks. However, the Board did not describe [Claimant's] scar, did not state whether it rejected the WCJ's description and did not explain why most WCJs would award within the 60 to 75 weeks' range. Therefore, a remand is in order, but as noted in City of Pittsburgh upon adequate explanation the Board may indeed reach the same result.

Id. at 989.

After remand, the Board reached the same result, stating:

Upon further consideration, we again modify the WCJ's award of disfigurement benefits to provide for an award of 70 weeks as explained below. ...

In the instant case, a panel of Commissioners had the opportunity to view Claimant's scar at oral argument ... in Harrisburg. At that time, the parties agreed that the WCJ's description of Claimant's scar in [F.F.] No. 3 was accurate. ... In again reaching our conclusion that the WCJ's award of benefits should be modified from [22] weeks to 70 weeks, we accept the WCJ's description of Claimant's scar, as agreed to by the parties. We further respectfully note by way of explanation, that a WCJ, who acts alone in making an award based on an assessment of the claimant's scar, does not have the benefit of being able to consult with other WCJs statewide to determine an appropriate award. Rather, he is limited to his subjective evaluation of the disfigurement. This Board, on the other hand, is comprised of multiple Commissioners who have the benefit and experience of viewing scars and awards in appeals from WCJ decisions statewide. It is based on our years of experience in reviewing such matters on a statewide basis, that we must again conclude that most WCJs throughout the Commonwealth of Pennsylvania would award between 60 and 75 weeks of compensation for Claimant's scar based on its location, color, contour, depth, length, and visibility. We therefore modify the WCJ's award to reflect a disfigurement award of 70 weeks.

Bd. Op., 7/12/09, at 2-4 (emphasis added). Upon review, we believe the Board's decision is adequate to satisfy our instructions on remand.

More specifically, in Dart Container I, this Court instructed the Board to describe Claimant's scar, state whether it rejected the WCJ's description, and explain why most WCJs would award within the 60 to 75 weeks' range. As is evident from the excerpt above, the Board accepted the WCJ's description of Claimant's scar and explained that most WCJ's would award within the 60 to 75 weeks' range based on the location, color, contour, depth, length and visibility of Claimant's scar. Thus, the Board's decision complied with our remand instruction. Moreover, the Board acted within its authority in accepting the WCJ's description of Claimant's disfigurement, but rendering an award different from that of the WCJ. See McHugh, 845 A.2d at 228 (“[t]he fact that the [Board] accepted the WCJ's description of [the] [c]laimant's disfigurement does not preclude the [Board] from making an award different from that of the WCJ.”)

In addition, contrary to Employer's assertions, the Board's failure to specifically state the WCJ “capriciously disregarded” in awarding 22 weeks of disfigurement benefits, does not warrant reversal of the Board's decision. Employer notes that in Hastings our Supreme Court specifically referenced the capricious disregard standard. In Hastings, our Supreme Court stated, “if the [Board] concludes, upon a viewing of a claimant's disfigurement, that the referee capriciously disregarded competent evidence by entering an award significantly outside the range most referees would select, the [Board] may modify the award as justice may require.” Id. at 192, 611 A.2d at 1190 (emphasis added).

Here, although the Board did not specifically use the term “capricious disregard” in its opinion, the Board ultimately determined the WCJ's award was

significantly outside the range most WCJs would award. In making this determination the Board, in essence, found the WCJ capriciously disregarded competent evidence. See, e.g., Phila. Gas Works v. Workers' Comp. Appeal Bd. (Camacho), 819 A.2d 1230, 1232 (Pa. Cmwlth. 2003) (“[a]n award significantly outside th[e] range [determined by the Board] is a necessary precondition to a determination that the WCJ capriciously disregarded statewide disfigurement awards.”). The Board’s failure to use the specific term “capricious disregard” does not alter our conclusion. See McHugh (upholding Board’s modification of WCJ’s disfigurement award from 15 to 55 weeks where Board determined WCJ’s award was below the range of what most WCJs award; no specific mention of “capricious disregard”).

Moreover, this is not a case like City of Philadelphia, relied on by Employer. There, this Court held it could not conduct meaningful review of a Board decision modifying a WCJ’s disfigurement award where the Board did not state what range was acceptable for the disfigurement at issue, what most WCJs would award within the applicable range or how the Board reached its conclusion that most WCJs would award greater compensation.

Here, unlike in City of Philadelphia, the Board stated the applicable range under the circumstances, the fact that most WCJs would issue an award within that range and how it reached its conclusion that most WCJ’s would award compensation within the higher range. As such, this Court is able to conduct

meaningful review of the Board's decision here. Thus, Employer's reliance on City of Philadelphia is misplaced.³

Further, the Board's reliance on experience and on shared decision-making is especially persuasive with this Court, given our specialized appellate jurisdiction. Our judges collectively benefit from repeated exposure to arcane issues involving private roads, forfeitures, drivers' license suspensions and real estate assessments which a common pleas judge might encounter only once or twice in a career. The same may be said of workers' compensation appeals dealing with such issues as subrogation rights, pension offsets and supersedeas fund reimbursement. Our judges also benefit from a collegial approach to decision-making. In sum, because the Board's explanation is consistent with many well-documented aspects of our appellate work, we accept it.

Based on the foregoing, the order of the Board is affirmed.

ROBERT SIMPSON, Judge

³ Similarly, Lord & Taylor v. Workers' Compensation Appeal Board (Bufford), 833 A.2d 1223 (Pa. Cmwlth. 2003), also cited by Employer, is distinguishable. In that case, the Court reversed and remanded where, despite substantially modifying a WCJ's disfigurement award, the Board did not indicate precisely which of several alleged disfigurements were covered by its award. In addition, the Board did not specify the range most WCJs would select for the disfigurement at issue.

Unlike Lord & Taylor, this is not a situation where Claimant sought an award for multiple scars, nor is it unclear which scar was covered by the Board's award. Additionally, as discussed more fully above, the Board here articulated the range most WCJs would select under the circumstances here and how it arrived at that range. Therefore, our decision in Lord & Taylor is inapposite.

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Petitioner	:	
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v.	:	No. 1323 C.D. 2009
	:	
Workers' Compensation Appeal	:	
Board (Lien),	:	
	:	
Respondent	:	

ORDER

AND NOW, this 29th day of January, 2010, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge