Putting A Price On Scarring: Pennsylvania Workers’ Compensation Disfigurement Awards

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INTRODUCTION

Although the main purpose of the Pennsylvania Workers’ Compensation Act is to provide wage loss benefits and pay for medical bills incurred by injured workers, the Act also provides monetary awards to employees who have sustained certain disfiguring work injuries. These awards are made by the Workers’ Compensation Judges and their decisions are reviewed by the Workers’ Compensation Appeal Board. This article discusses disfigurement awards, the scope of appellate review of the same, and the Board’s personal review of the claimant’s scar.

Thus, essentially, a workers’ compensation judge has authority to grant up to 275 weeks worth of total disability workers’ compensation benefits to any claimant who sustains scarring or disfigurement on the head, neck or face, (anywhere above the clavicle (the collar bone)).

In the 1970s and 1980s, the Commonwealth Court addressed the Workers’ Compensation Appeal Board’s (the Board’s) appellate function in regard to disfigurement awards. The Court made it clear that the Workers’ Compensation Appeal Board has the power to make Findings of Fact in regards to disfigurement awards that differ from the Workers’ Compensation Judge’s Findings as long as the Board personally reviews the claimant’s scar.

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juries to his neck requiring 14 stitches in one operation and 19 stitches in the other, the Commonwealth Court affirmed the Board's decision which, after viewing the scar, concluded that the one and a half inch scar on the claimant's neck was unsightly and awarded 17 weeks of compensation to the claimant.

In the early 1980s the Commonwealth Court was of the opinion that the Board could not, as a general rule, take additional evidence and substitute its own findings for those of the Judge. In 1982, the Commonwealth Court de-viated from its previous holdings, finding that it was proper for the Board to review and make factual determinations concerning scarring awards. Like a seesaw, the Commonwealth Court then decided, in 1983, in the case of Wyoming Sand and Stone v. W.C.A.B. (Bartholme) that the Board could not substitute its own findings for those of a Workers' Compensation Judge.

In regard to the different scope of review for the Board in disfigurement cases as follows: "In any disfigurement case, . . . 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 Referee (Workers' Compensation Judge). . . . The recitation of verbal descriptions of a scar is helpful, but often woefully inadequate to accurately preserve evidence which is received by the Referee (Workers' Compensation Judge) by his visual perception of that evidence . . . Words alone seldom capture the subjective elements fundamental to theReferee's (Workers' Compensation Judge's) decision. While we can describe the length, location and color of a scar, can we adequately verbalize the impact of these factors which combine to create a degree of 'ugliness', if you will, for which a claimant should receive a compensa-tion? Clearly, there is a need for consistency in dis-figurement awards and detailed and accurate stan-dards. The judgment of the Referee's (Workers' Compensation Judge's) will remain subjective; a 'half inch red line on the chin' could be disfiguring in one man's face and add character to another's. . . . There must be, therefore, substantial competent evidence to support not only an award, but also the amount of the award as well. When the amount of the award is unsupported by such substantial evidence, then the Board may accept additional evi-dence, and the most meaningful evidence there could possibly be, is the view of the disfigurement itself."

St. Joe's Zinc v. Commonwealth of Pennsylvania (Workers' Compensation Appeal Board (Howard), 59 Pa. Cmwlth. 363, 429 A.2d 126 (1981). In this case the claimant, who was splashed in the face with hot metal, was awarded 40 weeks of compensation by the Workers' Compensation Judge. On appeal, after observing the claimant and describing the claimant's facial disfigurement, the Board concluded that the judge "somewhat undervalued" the claimant's disfigurement and, as such, increased the judge's award from 40 weeks to 60 weeks. (Id. at 429 A.2d 1263). Contrary to the prior decision in Industrial Castings, (infra) St. Joe Zinc held that "there can be no doubt that there was competent evidence to support the Referee's (Workers' Compensation Judge's) findings. Indeed, a compari-son of the description of the scarring by the Referee (Workers' Compensation Judge) with that of the Board discloses no substantial difference in what each of them observed. Under such circumstances, we must conclude that the Board erred (as) a matter of law when it increased the award based upon its own observation of the claimant." (Id. at 1264). The Commonwealth Court later explained in Purex Corporation v. Commonwealth of Pennsylvania, Workers' Compensation Appeal Board (Ross), 66 Pa. Cmwlth. 499, 445 A.2d 267 (1982) that it would follow the Supreme Court's 1980 decision in McGartland v. Ampco-Pittsburgh Corporation, 489 Pa. 205, 413 A.2d 1086 (1980) for the proposition that the Board cannot take additional evidence and substitute its own findings for those of the Workers' Compensation Judge where the Workers' Compensation Judge's findings are sup-ported by competent evidence and that this rule also applied to cases involving disfigurement. Again, de-viating from the Industrial Castings case, the Supreme Court in Purex case held that it would not reverse the Board's decision which affirmed the judge's award of 26 weeks of disfigurement for a three inch scar on a claimant's nose, the Board find-ing that it would not disturb the judge's award where it was based upon substantial evidence. (455 A.2d 269, 270, 271). The Commonwealth Court noted that although the established rule was that the Board could not substitute its findings for those of the Workers' Compensation Judge without taking addi-tional evidence, the Board could personally view claimant's scar in a disfigurement case. The Commonwealth Court then discussed its reasoning in PEnnsylvania workers' Compensation Disfigurement Awards 163
The Commonwealth Court rendered two additional decisions in the 1980s, one of which decided that the Board could grant benefits to a claimant where the judge refused to award any benefits for disfigurement. The other case involved quite a different holding where the Court held that the Board could not change the amount of a disfigurement award. In the 1991 decision of Consolidated Coal v. WCAB (Bardos), the Commonwealth Court decided that the Board did not err in failing to view a claimant’s disfigurement where the Workers’ Compensation Judge adequately described the disfigurement. Specifically, the Court held that “only when the Referee has failed to describe the disfigurement in his findings of fact for subsequent review by the Board should the Board also view the disfigurement to determine whether an award for disfigurement is supported by substantial evidence.

THE SUPREME COURT SPEAKS

The Supreme Court finally clarified the Board’s role in disfigurement cases in Hastings Industries v. W.C.A.B. (Hyatt). In a decision which was almost the polar opposite of the Commonwealth Court’s decision in School District of Philadelphia (infra) five years earlier, the Supreme Court in Hastings held that

where scars are similar, we believe each case must be judged on its own merit because of the different physical characteristics of each person. This is a proper fact finding role of the (Judge).” (464 A.2d 459–461).

The Commonwealth Court specifically rejected the Board’s statement that by exercising its authority in viewing a claimant’s scar, it would promote uniformity in this area of the law. (Id. at 460).

The Supreme Court interpreted Hastings to stand for the proposition that the amount of an award in a disfigurement case is a mixed question of fact and law, however, the Board must view the scar and may change the amount of the award if it finds that the judge capriciously disregarded competent evidence. In a decision which further defined the Board’s power, the Commonwealth Court noted that the Board erred in modifying a disfigurement award from 15 weeks to 75 weeks where the Board failed to explain how it reached its decision that most judges would award amounts greater than the amounts awarded by the judge in question. The court held that although the Board has authority to modify a judge’s award, that authority is not unlimited. The Commonwealth Court also noted that the Board may not modify a disfigurement award without setting forth the reason for its modification and must make a determination that the judge’s decision was outside the range that most judges would award for a similar scar or that justice requires such a modification.

In a concurring decision, Justice McDermott noted that while the Court approved of the power of the Board to review the amount of a judge’s award in a disfigurement case, they were not passing on the standards which the Board would utilize in computing the actual award. This statement is quite true and, unfortunately, points out the fact that, to this day, the Board has no written standard by which they review workers’ compensation disfigurement awards.

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12 Id. at 598 A.2d 336.
13 531 Pa. 186, 611 A.2d 1187 (1992). The claimant in Hyatt sustained scarring on his eyebrow, face and earlobe and was awarded 17 weeks worth of benefits by the Workers’ Compensation Judge which was thereafter reversed by the Board, finding that the proper award should have been 50 weeks, the Board indicating that the increase was “necessary to achieve uniformity of the Referee’s of Pennsylvania.” (611 A.2d 1188). The Commonwealth Court reversed the Board’s decision and reinstated the judge’s initial award of 17 weeks, however, the Supreme Court, in reversing the Commonwealth’s Court’s decision, found that in disfigurement cases, the amount of the disfigurement awarded is a mixed question of fact and law which is subject to review by the Board. (Id. at 1190).

14 Id. at 1190.
The most recent Commonwealth Court disfigurement decisions concern employers’ appeals of Board decisions which increase the amount of a judge’s award. In one case, the Board increased the judge’s award from 4 weeks to 22 weeks\(^{19}\); in another from 30 weeks to 100 weeks\(^{20}\); and in a third from 15 weeks to 55 weeks.\(^{21}\) In the Commonwealth Court decision of General Motors v. WCAB,\(^{22}\) which basically guts the power of the Workers’ Compensation Judge in regard to disfigurement awards, the court held that even where the Board did not disagree with the judge’s description of the claimant’s scar, the Board still has the power to change the judge’s award. The Court indicated that

if the WCAB, upon viewing a claimant’s disfigurement, concludes that the Workers’ Compensation Judge entered an award significantly outside the range most Workers’ Compensation Judges would select, the Board may modify the award as justice requires. . . 

Thus, in reviewing a Workers’ Compensation Judge’s award for disfigurement, the Board may agree with the judge’s written description of the disfigurement and, yet, still most translate the visual impact of the claimant’s disfigurement into a monetary award based on the Board’s own view of the claimant’s visage. . . 

Employer asserts that it actually is the Board’s award, not the judge’s award, which is outside the range of what most judges would award in a similar disfigurement case. Specifically, employer maintains that, based on the only guide known to it on this matter . . . the ‘rule of thumb’ is that judges in Western Pennsylvania award compensation at 10 weeks per inch in a standard linear scar case . . . Again, we disagree. . . This ‘rule of thumb’ simply is an observation, and the mere fact that it is contained in a treatise on workers’ compensation law, certainly does not give the ‘rule of thumb’ presidential value. It is the Board’s duty to enter an award, based on its experience, that is reasonably uniform with awards in similar disfigurement cases throughout Pennsylvania . . . The Board performs the valuable function of promoting uniformity in disfigurement awards throughout Pennsylvania . . . (the) ‘rule of thumb’ which appears to be a concept that is local in nature, i.e., Western Pennsylvania, and that is limited to standard linear cases does not further this goal of uniformity . . . Employer points out that the Workers’ Compensation Appeal Board . . .

\(^{23}\) 845 A.2d at 228, 229.


\(^{25}\) Id. at Sec. 5:175.

\(^{26}\) Id. It is clear that this would be appropriate as it would be patently unfair to award a claimant a smaller or larger gross sum for the same disfigurement solely as a result of differing compensation rates.

\(^{27}\) 845 A.2d at 228, 229.

a particular scar is valued at a certain number of weeks worth of compensation. The result is, at least, confusion and at worst, anarchy. Take for instance, the Commonwealth Court's recent decision in *Fulton County Medical Center.* In *Fulton County* the Workers' Compensation Judge awarded a claimant 35 weeks for a scar which was located on the front the claimant's neck which was incurred as a result of work-related cervical surgery. The scar was described by the Workers' Compensation Judge as being two and a half inches long, on the front of the neck and as a "typical cervical scar". The Workers' Compensation Judge's award of 35 weeks was appealed to the Board by the claimant. In its decision reversing the Judge's award and granting the claimant 100 weeks for this two and a half inch scar, the Board indicated that most Judges would award between 80 and 120 weeks for such a scar. On appeal to the Commonwealth Court, the employer argued that the Board's decision was unreasoned in that the Board did not cite the basis for its decision that most Judges would award between 80 and 120 weeks of disfigurement benefits for a two and half inch scar. The Commonwealth Court, in rejecting the employer's argument, indicated that the Board did not have to cite a previous award of any Judge or the Board and that the Board had "expertise" in regard to scarring awards. In a manner that clearly exceeds the Supreme Court's decision in *Hastings,* the Commonwealth Court in *Fulton County* indicated that it is not the Judge's awards that should be looked at in determining whether an award is significantly outside the scope of awards for similar scars, (such as *Hastings* instructed); the appropriateness of a Board award is to be solely determined by the Board, without citing other awards for consistency. However, no where in the Workers' Compensation Act is the Board provided with original jurisdiction in regard to workers' compensation disfigurement awards. Thus, even though the Commonwealth Court in *General Motors* indicated that it would not make any decision in regard to prescribing periods or rendering guidelines in regard to specific awards of disfigurement compensation as such was a matter within the province of the legislature, the trend over the past several years in regard to the Commonwealth Court has been such that the Judges' decisions in scarring awards really are of no value. The Judges' decisions in scarring awards can be reversed without the Board doing more than looking at the claimant's scar and saying that the Judge's award was not within the scope that it would have awarded a claimant with a similar scar. There is no requirement that the Board cite any authority for its decision; the previous decision of any Judge; any previous decision of the Board; or any authority whatsoever. This, in sense, eviscerates the power of the Workers' Compensation Judge in regard to scarring awards.

### VALUING DISFIGUREMENT

The Board's decision to award 100 weeks for a two and a half inch scar in the *Fulton County* case must be looked at in the context of the parameters of disfigurement awards. Specifically, the Legislature has "capped" the amount of disfigurement awards to 275 weeks worth of benefits. Thus, in fairness, only the most severe of disfigurement cases should be provided with 275 weeks worth of disability benefits. It appears unfair and unconscionable for a person with a two and a half inch scar on their neck to receive 100 weeks worth of disfigurement benefits when a different person who, for instance, suffers a mechanical injury to their face which causes severe disfigurement, or severe burns that totally distort the face is only provided with 275 weeks worth of benefits. Yet, the Commonwealth Court seems to be sanctions the Board's trend to award increasing amounts of disfigurement benefits for slight scarring and to routinely increase the amount of benefits awarded by Judges.

The Board should adopt some standards by which the value of scarring awards can be measured by:

1. Setting a starting point standard for linear scar cases, be that 10, 20, 40, etc. weeks per inch of scarring.
2. Setting forth and consistently following awards that it makes in scarring cases.
3. Review of all scarring awards by the Chairman of the Board.

### CONCLUSION

The Supreme Court's decision in *Hastings* never gave the Workers' Compensation Appeal Board unlimited jurisdiction in scarring cases. If the Board chooses to substitute its findings of fact for those findings of fact made by the
Workers’ Compensation Judges, then the Board should, at a minimum, set forth its basis for awards in disfigurement cases as opposed to simply indicating that their award is within the scope that most Judges would award or that the Board would award without citing particulars as to exactly what cases and decisions to which they are referring. Workers’ compensation practitioners cannot appropriately value cases for settlement purposes or any other purpose if the Board determines, on its own, that a scar is worth more or less than what a Judge determined without providing a reason for its decision as to the value of the scar.