STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

BRYANNA A. PIMENTAL	)	
	)	
VS.	)	W.C.C. 2012-01244
	)	
LIFESPAN CORPORATION	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's claim of appeal from the decision and decree of the trial judge awarding disfigurement benefits for two (2) scars resulting from a work-related injury. The employee contends the amount awarded after trial for one (1) scar is inadequate when compared to the amount awarded for the other scar which was noticeably smaller in size. After reviewing the pertinent statute and case law, and considering the arguments of the respective parties, we find that the specific compensation award for the four (4) inch (10.16 cm.) scar is in concurrence with the law and evidence presented by both parties and does not constitute an abuse of discretion by the trial judge.

The petition filed by the employee requested specific compensation for disfigurement caused by two (2) scars on the employee's right forearm. The first scar measured 1.5 cm. by 2 cm. in length. The second, more linear scar, measured 10.16 cm. (or approximately four (4) inches) in length. At the pretrial conference, the trial judge granted the petition in part, awarding benefits for the 1.5 cm. by 2 cm. scar, but denying benefits for the longer scar. The award for the smaller scar was Ninety and 00/100 ($90.00) Dollars per week for a period of twenty (20) weeks

totaling One Thousand Eight Hundred and 00/100 ($1,800.00) Dollars. The employee filed a timely claim for trial.

During the trial, the parties stipulated to the findings of the pretrial order and that all scars had reached an end result. They agreed that the only issue in dispute was whether the longer, linear scar was caused by the incident at the workplace and, if so, the amount of the award for that scar.

The employee testified that she was working as a utility worker in the food and nutrition department at Rhode Island Hospital on May 25, 2011. On that date, the employee she was in the process of refilling the soap in one of the dishwashing machines in the kitchen, when she slipped on a wet tray on the floor and hit her right arm on a hot pipe that was located behind the machine, causing the burns to her right forearm. The employee's supervisor sent her to Employee Health where she was treated and her arm was wrapped with gauze from just above her wrist to just below her elbow. The employee then returned to work.

A number of photographs were identified by the employee and admitted into evidence. Two (2) of the photographs of her forearm were taken the day after the incident. Six (6) of the photographs were taken after the scars had healed. Two (2) of these photographs depict the scar for which benefits were awarded at the pretrial conference, and four (4) of these photographs depict the scar that is in dispute.

The employee called several witnesses to testify as to their observations of the appearance of her forearm around the time of the incident. Sannyta Lin, a co-worker, testified that she observed the employee's right forearm wrapped with gauze from her elbow to her wrist on May 25, 2011. Ms. Lin also identified two (2) scars in the photographs taken the day after the incident as the two (2) scars she observed on the employee's forearm about two (2) weeks later.

Nancy Rojas, another co-worker, testified that she saw the employee's forearm bandaged from just below the elbow, almost to her wrist on the day of the incident. She also saw several inches of a linear scar when Ms. Pimental peeled back the bandage on a few occasions thereafter. Cassandra Mitchell testified that she escorted Ms. Pimental to Employee Health on the day of the incident, and identified one (1) of the photographs as depicting the large burn she saw on the employee's forearm that day.

Dr. Nancy Littell, the on-site physician at the employee health clinic who treated Ms. Pimental on May 25, 2011, testified that she did not have any independent recollection of the appearance of the employee's arm on that date. Dr. Littell stated that it is common practice to measure the length and width of any burns and include the measurement in her medical note. The records from the Employee Health Services Department of Rhode Island Hospital were introduced into evidence and reveal that the employee was treated on May 25, 2011 for first and second degree burns on the right forearm which occurred when she tripped on a broken plate and burned her arm on a hot pipe. The handwritten notes by the attending physician, Dr. Littell, do not document the length or width of the burns. The doctor's typewritten notes state there is one area of blistering measuring 1.5 centimeters by 2 centimeters, but do not contain any other measurements. The report does indicate that the burns are otherwise flat.

The trial judge found that the longer, linear scar was a result of the incident at work when Ms. Pimental slipped and fell burning her right forearm. The trial judge awarded benefits to the employee for twenty-eight (28) weeks at Ninety and 00/100 ($90.00) Dollars per week for a total award of Two Thousand Five Hundred Twenty and 00/100 ($2,520.00) Dollars for the linear scar. The employee filed a claim of appeal stating that the trial judge abused her discretion by

awarding only an additional eight (8) weeks, or Seven Hundred Twenty and 00/100 ($720.00) Dollars, for the longer scar than she had previously awarded for the smaller scar.

When undertaking a review of a trial judge's decision, the Appellate Division is guided by the standard set forth in R.I.G.L. §28-35-28(b), which states that "the findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." We are barred from engaging in a de novo review of the evidence and substituting our own judgment for that of the trial judge without first determining that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). After thoroughly reviewing the record and the trial judge's decision with this deferential standard as our guide, we conclude that the findings of the trial judge are not clearly erroneous and we therefore deny the employee's appeal.

The employee has filed four (4) reasons of appeal, most of which can be dismissed because they do not satisfy the requirements for specificity in the appellate process contained in R.I.G.L. §28-35-28(a). In her first three (3) reasons of appeal, the employee asserts that the decree is against the law, the decree is against the evidence, and the decree is against the law, the evidence, and the preponderance thereof. Section 28-35-28(a) "requires that the reasons of appeal filed with the [court] specifically state all matters determined adversely to the appellant." Bissonnette v. Federal Dairy Co., 472 A.2d 1223, 1226 (R.I. 1984), *quoting* Lamont v. Aetna Bridge Co., 107 R.I. 686, 690, 270 A.2d 515, 518 (1970). In the present case, the employee simply stated general reasons of appeal much like those which were addressed in Bissonette. Thus, because of the failure to comply with the requirement for specificity set forth in §28-35-28(a), the first three (3) reasons of appeal are dismissed.

In her fourth reason of appeal, the employee contends that the award of twenty-eight (28) weeks for the four (4) inch linear scar is so inadequate that it shocks the conscience and constitutes an abuse of discretion. Section 28-33-19(a)(3)(i) provides for the payment of compensation for permanent disfigurement of the body caused by a work injury and sets a maximum award of 500 weeks. Many years ago, the Rhode Island Supreme Court defined disfigurement as "that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, mis-shapen or imperfect or deforms in some manner." St. Laurent v. Kaiser Alum. & Chem. Corp., 113 R.I. 10, 13, 316 A.2d 504, 506 (1974), *quoting* Superior Mining Co. v. Industrial Comm'n, 309 Ill. 339, 340, 141 N.E. 165, 166 (1923). The Court further noted that "[i]t must be an 'observable impairment of the natural appearance of a person.'" Id., *quoting* Arkin v. Industrial Comm'n, 145 Colo. 463, 472, 358 P.2d 879, 884 (1961).

The Workers' Compensation Act does not contain any standards or guidelines for determining the amount of an award for disfigurement. Absent any statutory guidelines, "[i]t is clear, then, that the amount of compensation that would be proper and equitable in given circumstances is a question addressed to the sound discretion of the [trial judge]." St. Laurent, 113 R.I. at 15, 316 A.2d at 506. The party appealing the amount of an award for disfigurement bears the burden of establishing that the award is so inadequate as to constitute an abuse of the trial judge's discretion.

In St. Laurent, *supra*, the employee lost his right eye as a result of an injury at work and the employer provided him with an artificial eye. After a hearing on his petition for specific compensation for disfigurement, the employee was awarded sixty (60) weeks of compensation at the rate of Forty-five and 00/100 ($45.00) Dollars per week, which was affirmed at the appellate

level. On appeal to the Rhode Island Supreme Court, the employee argued that the amount of the award was "totally inadequate," "not equitable," and "shock[ed] the conscience of anyone with ordinary sensibilities." Id. at 12, 316 A.2d at 505. After reviewing the trial commissioner's decision which was based upon his observations of the employee with the artificial eye and without it, photographs of the employee with the artificial eye and without it, and the employee's testimony that he occasionally removed the artificial eye due to irritation and work dark glasses, the Court concluded that "in the circumstances we cannot say that the award was so inadequate as to show an abuse of discretion." Id. at 15, 316 A.2d at 507.

The employee also cites the decision of the Rhode Island Supreme Court in Johnson v. State, 634 A.2d 863 (R.I. 1993), in support of her contention that the award is inadequate. The employee in Johnson suffered a severe crushing injury to his lower right leg in 1981. In 1984, the employee was awarded specific compensation for disfigurement for a period of 125 weeks totaling Eleven Thousand Two Hundred Fifty and 00/100 ($11,250.00) Dollars. In 1990, due to complications arising from the initial injury, the employee's right leg was amputated approximately seven (7) inches below the knee. The employee filed a petition requesting compensation for the additional disfigurement caused by the amputation. The trial judge awarded fifteen (15) weeks of additional disfigurement benefits, which was affirmed by the Appellate Division.

The Rhode Island Supreme Court was confronted with the question of whether the trial judge's award of fifteen (15) weeks for the disfigurement caused by the amputation as compared to 125 weeks for the previous disfigurement to the employee's leg was so inadequate as to constitute an abuse of discretion. In concluding that the award of fifteen (15) weeks was inadequate, the Court stated,

> In the instant case we believe the only reasonable conclusion open to the trial judge and the appellate division, upon considering the evidence presented during the hearing, was that an amputated limb is at least as disfiguring, not substantially less disfiguring, than a crushed limb.

Id. at 865. The Court vacated the award and remanded the matter for further proceedings.

In the present matter, the trial judge personally observed the scars on the employee's forearm and viewed the photographs of the scars. At the pretrial conference, an award of twenty (20) weeks was made for one of the scars which was not contested at trial. After trial, the judge evaluated the second, longer but more linear scar, and awarded twenty-eight (28) weeks. The employee contends that the award of only eight (8) weeks more than the award for the smaller scar is insufficient because the second scar is significantly longer. Clearly, this differential is not even remotely similar to the dramatic difference in the awards involved in Johnson, *supra*, which led the Court to find an abuse of discretion.

As noted previously, there is no statutory table or chart for trial judges to utilize in evaluating disfigurement, and consequently, different judges may assign different values to similar scars or other disfiguring effects. At the appellate level, we cannot simply substitute our judgment for that of the trial judge because we may have assigned a different value to the disfigurement. In order to vacate a disfigurement award, we must find that the award is so grossly inadequate as to shock the conscience. Only then can we conclude that the trial judge abused the very broad discretion granted her in determining the award for disfigurement. In the present matter, the award of twenty-eight (28) weeks for the scar in question, even in comparison to the previous award for the other scar, does not "shock the conscience," and therefore, we find that the trial judge did not abuse her discretion in making that award.

Based upon the foregoing discussion, we deny and dismiss the employee's claim of appeal and affirm the decision and decree of the trial judge. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Hardman and Ferrieri, JJ. concur.

ENTER:

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Olsson, J.

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Hardman, J.

_____
Ferrieri, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division on the claim of appeal of the petitioner/employee and upon consideration thereof, the employee's appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on October 2, 2012 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

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John A. Sabatini, Administrator

ENTER:

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Olsson, J.

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Hardman, J.

_____
Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Andrew S. Caslowitz, Esq., and James T. Hornstein, Esq., on

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