COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS — BOARD NOS. 072876-01, 037811-02

Daniel Focht	Employee
Springfield Falcons c/o Phoenix Coyotes	Employer
Federal Insurance Company	Insurer

REVIEWING BOARD DECISION

(Judges Carroll, Horan and Fabricant)

APPEARANCES

James S. Aven, Esq., for the employee
Kathleen M. Greeley, Esq., for the insurer at hearing
Gerard A. Butler, Esq., for the insurer on appeal

CARROLL, J. The question presented by the insurer's appeal of this hearing decision is whether the specific compensation provisions for bodily disfigurement, G. L. c. 152, § 36(1)(k), apply to separate injuries, or allow for just a single lifetime recovery of up to $15,000 per employee? [1] The administrative judge concluded that a professional hockey player who claimed § 36(1)(k) compensation for facial scarring for more than one incident was entitled to separate compensation for each event amounting to a greater sum than $15,000. We agree with the judge that the $15,000 maximum in § 36(1)(k) is a per-injury cap, and affirm the decision.

Daniel Focht was paid for facial disfigurement sustained while playing professional hockey on December 28, 1999 and September 9, 2000. He then sustained additional

[1] General Laws c. 152, § 36(1)(k), provides compensation to the employee:

> For bodily disfigurement, an amount which, according to the determination of the member or reviewing board, is a proper and equitable compensation, not to exceed fifteen thousand dollars; which sum shall be payable in addition to all other sums due under this section. No amount shall be payable under this section for disfigurement that is purely scar-based, unless such disfigurement is on the face, neck or hands.

facial scarring in two more injuries, on two different dates during the 2001-2002 playing season. It was these claims that the present decision addressed. The insurer contended at hearing that the employee was already capped at the $15,000 maximum entitlement for scarring and disfigurement under § 36(1)(k), due to the prior payments. The employee countered that the $15,000 cap was a per-injury maximum, not a total lifetime entitlement for an employee. (Dec. 3.) The judge agreed with the employee and awarded him the § 36(1)(k) benefits claimed. (Dec. 6.)

The insurer's appeal presents a pure question of law: is the $15,000 maximum entitlement in § 36(1)(k) a lifetime entitlement for an employee, or is it a per-injury cap? We agree with the employee and the judge that it is the latter.

Section 36(1) contains the following introductory language: "In addition to all other compensation to the employee shall be paid the sums hereafter designated for the following specific injuries; provided, however, that the employee has not died from any cause within thirty days of such injury: . . ." The reference to "such injury" would appear to eliminate any ambiguity that exists in paragraph (k) regarding its application to either an injury or an employee: § 36, as a whole, contemplates specific compensation for an "injury."

The law has been clear for decades: "The rate [2]of compensation is determined by the statute in force at the time of injury." Steuterman's Case, 323 Mass. 454, 457 (1948). "The Legislature is presumed to have been aware of [such] decisions at the time it enacted St. 1991, c. 398." Taylor's Case, 44 Mass. App. Ct. 495, 500 (1998). If the Legislature in 1991 intended to change the application of the § 36(1)(k) cap from injury to employee, by virtue of its change in the method of calculating the maximum entitlement, it easily could have said so. [3] We are not inclined to infer such an intention.

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[2] The $15,000 is the maximum 'rate' to be assigned the injuries in this case. See Barbaro v. Smith and Wesson, Inc., 9 Mass. Workers' Comp. Rep. 652, 658-659 (1995).

[3] We are also reminded of the agency practice of using the state average weekly wage (SAWW) as of the date of injury, as a multiplier for the measurement and characterization of scar based disfigurement. Puleri v. Sheaffer Eaton 10 Mass. Workers' Comp. Rep. 31 (1996), citing Wellington v. Commissioner of Corporation and Taxation 359 Mass. 448, 452 (1971)(where the language of a statute permits more than one reasonable interpretation, contemporary administrative construction, especially if long continued, is significant.)

To the extent different injuries cause different bodily disfigurements, we consider each subject to its own $15,000 maximum. We see no legislative intent that the employee be subject to an omnibus disfigurement accounting between various insurers covering various injuries. [4]

Accordingly, we affirm the decision. We order that the insurer pay employee's counsel a § 13A(6) fee in the amount of $1,357.64.

So ordered.

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Martine Carroll
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: April 4, 2006

FABRICANT, J., dissenting. Section 36(1)(k) is unique among all of the specific loss provisions of § 36, and that quality must be taken into account in construing the scope of its application.

Paragraphs (a) through (i) are all self-limiting in their application. Paragraph (j) is a catch-all provision for losses of bodily function or sense that are not covered in the preceding specific loss provisions. This provision explicitly applies to *each* loss thereunder. Every one of the § 36 paragraphs (a) through (j) provides for a maximum award of the average weekly wage in the commonwealth on the date of injury multiplied by some figure. It is clear that these maximums apply to separate and distinct injuries.

Section 36(1)(k), on the other hand, is *not* self-limiting, as is evident in the present case, in which the employee has received no less than *four* maximum scarring awards. And,

[4] A lump sum agreement ascribing the $15,000 maximum for disfigurement for one date of injury/insurer could not, under the Supreme Judicial Court decision in Kszepka's Case, 408 Mass. 843 (1990), be used by a subsequent insurer in a different case to argue that the employee is barred from receiving additional § 36(1)(k) benefits.

unlike paragraph (j), paragraph (k) tellingly does *not* provide for an award for "each" disfigurement: it is only "[f]or bodily disfigurement."

Most importantly, as noted by the majority, the Legislature changed not only the quantity of the paragraph (k) maximum in 1991, but it also changed the *quality* of that "rate of compensation." See Steuterman, supra. By amending the prior rate of 32 times the average weekly wage in the commonwealth *at the date of injury* to a fixed sum of $15,000, the Legislature removed any reference to any one date of injury from the provision. [5] This unique treatment is noteworthy, and supports a construction limiting recovery under this section to $15,000 total per employee. Had the Legislature merely meant to reduce the maximum award *per injury*, it would have simply reduced the multiplier from 32 to whatever figure it deemed appropriate. Instead, it changed the entire method of calculation. [6]

"[D]ifferences in language between such [related] statutes must reflect different intended meanings." Martha's Vineyard Land Bank Comm. v. Bd. of Assessors of West Tisbury, 62 Mass. App. Ct. 25, 30 (2004). It appears to me that the Legislature intended a break from the per-injury formulation of paragraph (k) as it stood before the 1991 amendment, and from the other unamended specific loss provisions. [7] I would reverse the decision and deny the employee's two claims for successive facial scarring.

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[5] Prior to 1991, § 36(1)(k) read: "For bodily disfigurement, an amount which, according to the determination of the member or reviewing board, is a proper and equitable compensation, not to exceed the average weekly wage in the commonwealth at the date of injury multiplied by thirty-two."

[6] The majority's assignment of a $15,000 cap based upon the date of injury is arbitrary precisely because it doesn't provide for an award based purely on disfigurement, which the statute was clearly intended to do. The resulting awards may be, to say the least, inconsistent. Under the majority analysis, if a hypothetical employee loses an arm and a leg in the same industrial accident, the maximum recovery totals $15,000. However, if the same employee instead loses an arm in an earlier industrial accident, and a leg in a different accident, he could potentially recover $30,000 for the same aggregate disfigurement.

[7] The reference to "such injury" in § 36's introductory 30-day waiting period is not at all inconsistent with a specific cap on aggregate injuries within the purview of § 36(1)(k).

Accordingly, I dissent.

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Bernard W. Fabricant
Administrative Law Judge

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