COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 039304-00**

Douglas Evans	Employee
Geneva Construction Company	Employer
Valley Forge Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Levine[1])

The case was heard by Administrative Judge Sullivan.

APPEARANCES
Brian R. Sullivan, Esq., for the employee
Martin T. Sullivan, Esq., for the insurer[2]

COSTIGAN, J. The insurer appeals from a decision awarding the employee specific compensation for disfigurement to his abdomen, pursuant to G. L. c. 152, § 36(1)(k).[3] We reverse the decision, vacate the award and recommit the case to the administrative judge for the admission and consideration of medical evidence, and for further findings.

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[1] Judge Levine recused himself and did not participate in panel deliberations.

[2] The judge noted there was "an all Sullivan cast" at the hearing, (Tr. 2), but he is not related to either attorney, nor are they related to each other.

[3] General Laws c. 152, § 36(1), provides, in pertinent part:

> In addition to all other compensation to the employee shall be paid the sums hereafter designated for the following specific injuries; . . .
>
> (k) 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.*

(Emphasis added.)

On October 5, 2000, the employee was injured when a blasting cap exploded at a work site. The insurer accepted liability, and paid various periods of weekly incapacity benefits.[4] In 2008, pursuant to § 36(1)(k),[5] the employee filed a claim for disfigurement benefits for scarring on his face and hands, and disfigurement in the form of a crater-like depression on his abdomen, with black dots surrounding the depression. Following the § 10A conference, the judge ordered the insurer to pay the employee $5,666.43 for the scarring on his face and hands, but denied the claim for disfigurement of his abdomen. (Dec. 1.) The insurer did not appeal that award.

The employee did appeal, contending he was entitled to additional compensation for his abdominal disfigurement because it was not "purely scar-based." See footnote 3, supra. At hearing, the judge stated that the parties had "opted out of the impartial system because there is not an ongoing open claim for disability."[6] (Tr. 4.) The insurer stipulated that "the condition that appears in the

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[4] We take judicial notice of documents in the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[5] As required by 452 Code Mass. Regs. § 1.07(2)(i)(2), the employee submitted with his claim form a medical report dated April 12, 2005 from Dr. Francis Powers, describing the scars on his face, neck and hands. He also submitted a report dated October 18, 2000 (two weeks after the accident) from Dr. David Lautz, which described the injury to his abdomen, and he included calculations of the value of his scarring and disfigurement, categorizing the abdominal disfigurement as "slight" and specifying the monetary value as $4,154.45. These documents were also submitted by the employee at the § 10A conference. See Rizzo, supra.

[6] Massachusetts General Laws c. 152, § 11A, provides, in pertinent part, that an impartial examiner shall be agreed upon by the parties or appointed by the judge where there is a "dispute over medical issues."

452 Code Mass. Regs. § 1.02 defines "Disputes Over Medical Issues," as used in § 11A, as *not* including any case in which:

> (a) the parties disagree solely regarding the entitlement to weekly benefits concerning a specific period or periods of disability, or death which occurred prior to the hearing scheduled pursuant to M.G.L. c. 152, § 11;
> (b) the parties disagree regarding the liability of the named insurer for any claimed injury; provided, however, that the parties agree that no impartial physician's report is required;

employee's abdomen is causally [related] to the events of October 5, 2000." (Tr. 5.) The judge defined the controversy: "it's a legal issue and that is whether or not disfigurement to the stomach is covered under the statute, under Section 36." (Tr. 4.) Neither party offered any medical evidence, and no testimony was taken. Two photographs of the employee's affected abdominal area were the only evidence of his disfigurement. (Ex. 4.)[7]

In his decision, the judge wrote:

> I conducted the very brief Hearing on May 26, 2009. The parties agreed that there was one narrow legal issue. Does Section 36(k) of the "Act" provide entitlement for scarring/disfigurement in the area of the abdomen? Neither party called a witness. On June 30, 2010 I wrote to both attorneys requesting that they file with me documents they had referenced in their closing arguments. Both appeared on July 14, 2010 with those documents which I

> (c) the parties agree upon both the nature of the impairment and the causal relationship between the impairment and the employment; provided, however, that the parties agree that no impartial physician's report is required[;]
> (d) based upon the information submitted at a Conference pursuant to M.G.L. c. 152, § 10A, *the administrative judge determines that there is no dispute over medical issues. The judge's determination, and reasons therefore, shall be stated in the M.G.L. c. 152, § 10A Conference order.*

(Emphasis added.) The judge's stated reason for the parties' purported "opt out" of the impartial medical examination, (Tr. 4), appears to fall under § 1.02(a), which is plainly inapplicable. Liability for the employee's industrial injury had been accepted by the insurer, rendering § 1.02(b) inapplicable. As discussed infra, although the parties stipulated to the causal relationship between the work injury and the employee's disfigurement, they did not stipulate to the nature of same. Thus, § 1.02(c) did not apply. To the extent the judge made the determination that there was no dispute over a medical issue, contrary to the above-quoted § 1.02(d), his July 2, 2008 conference order did not, as the rule requires, reflect his determination or the reasons therefor. See Rizzo, supra.

[7] The judge's decision reflects there were no witnesses at hearing. (Dec. 3.) The verbatim transcript of the hearing is silent as to whether the employee was present or, if he was, whether the judge took a view of the employee's abdomen. Given that the judge and the parties agreed the employee would submit photographs of the claimed abdominal disfigurement, (Tr. 4-5, 11), it seems unlikely the judge observed the disfigurement in person. The insurer, however, does not challenge the judge's award on this basis. Cf. Adam v. Harvard Univ., 24 Mass. Workers' Comp. Rep. 193 (2010)(employee's absence from evidentiary hearing precluded judge from observing alleged atrophy of right upper extremity; § 36(1)(k) claim properly denied and dismissed).

marked as exhibits.

(Dec. 1-2.)[8] The judge noted that he "agreed with the attorneys that no [i]mpartial physician would be required." Id. He found:

> The parties did not dispute the *nature of the causally related industrial injury.* "The explosion resulted in injuries to his abdomen that healed leaving a one and a half-inch crater-like depression two inches above his navel and a series of black dots in the surrounding area." Insurer's Memorandum of Law, May 26, 2006.

(Dec. 4; emphasis added.) The judge recounted the employee's argument that the depression in his abdomen was not purely scar-based disfigurement, but was similar to atrophy, which would be compensable under §36(1)(k).[9] He also set out the insurer's argument that both the definitions contained in the American Medical Association Guides to the Evaluation of Permanent Impairment,[10] (Ex. 5), and the Appeals Court's decision in Corriveau v. Home Ins. Co., 43 Mass. App. Ct. 924 (1994), required a finding that the employee's abdominal disfigurement was scar-

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[8] The admitted exhibits were: 1) the employee's hearing memorandum; 2) the employee's biographical data sheet, admitted as if Mr. Evans had so testified; 3) the insurer's hearing memorandum; 4) two photographs of Mr. Evans's abdominal injury; and 5) pages 162 and 163 of the American Medical Association's Guides to the Evaluation of Permanent Impairment, 6th Edition [2008]. (Dec. 3.)

[9] The judge quoted employee's counsel's statement at hearing:

> This man now has a crater in his stomach that is actually an indentation and it has actually transformed the whole look of his stomach. So it's not as if he has a scar in the regular meaning of the word. This man now essentially has a hole in his stomach. There's an indentation that was not there beforehand.

(Dec. 4-5, quoting Tr. 7.)

[10] The judge quoted from the AMA guidelines:

> "Skin disfigurement is an altered or abnormal appearance that may be an alteration of color, shape, or structure, or a combination of these. Disfigurement may be a residual of injury or disease, or it may accompany a recurrent or ongoing disorder." Exhibit 5, Section 8.2, page 162. "Scars are cutaneous abnormalities that result from the healing of burned, traumatized, or diseased tissue. They represent a special type of disfigurement[.]" Exhibit 5, Section 8.3, page 162.

(Dec. 5.)

based, and thus not compensable. The judge further noted the insurer's contention that Corriveau, supra, stands for the proposition that the purpose of § 36(1)(k) is to limit compensation for disfigurement to those parts of the body where scarring is ordinarily visible. (Dec. 4-6.)

The judge concluded that "the legislature distinguished . . . between bodily disfigurement in general and disfigurement that is purely scar based," (Dec. 4), so that disfigurement to the employee's abdomen which was not purely scar based would be compensable. Although he found that "[t]he parties did not dispute the nature of the causally related injury," with respect to the employee's disfigurement, the judge found:

> Neither party offered medical evidence as to the *nature of the relevant structures,* whether the "one and a half-inch crater-like depression two inches above his navel" as described by insurer's counsel or the numerous and rather unsightly black dots that surround it. [sic] The obvious depression *appears to be* the loss of subcutaneous tissue while the black dots *appear to be* superficially embedded gunpowder residue.
>
> I find that the workplace injury to the stomach of Mr. Evans is a *combination of general disfigurement and scar based disfigurement*. The general disfigurement, which is compensable, involves the crater-like depression, *the apparent loss of subcutaneous tissue, an abnormal appearance involving an alteration of structure.* I find that the statutory disfigurement is "slight" and, therefore, I assign the value of $3,323.56,[11] calculated as four times $830.89, the state average weekly wage as of the date of the industrial accident. The scar-based disfigurement, which is not compensable, involves the numerous superficial black dots, superficial cutaneous abnormalities that result from the healing of burned tissue.

(Dec. 5-6.) (Emphases added; underlines original.)

Only the insurer appeals. Although it endorses the judge's view that the question presented by the employee's claim was "a legal one, not a medical one,"

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[11] At hearing, the parties stipulated that the conciliator had valued the disfigurement, if compensable, at $4,985.34, which amount included the scar-based disfigurement (the black dots). The judge adopted the stipulation as a finding of fact, (Dec. 2), but found the black dots not compensable, and reduced the § 36(1)(k) award accordingly. (Dec. 7.)

(Ins. br. 5), the insurer argues that the judge, as a lay person, was not qualified to speculate on the physiological process that led to the abdominal indentation. Without the aid of expert medical evidence, contends the insurer, the judge was not qualified to determine that the crater-like depression "appears to be the result of loss of subcutaneous tissue," and thus to reach the legal conclusion it was not purely scar-based. (Ins. br. 4-5.) However, the insurer also argues, without the very same expert medical evidence it says the judge needed, that the abdominal depression fits clearly within the definition of scarring in the AMA guidelines, since, "[r]egardless of how it developed, it is clearly a cutaneous, or skin, abnormality that resulted from the healing of traumatized tissue." (Ins. br. 7.) Both the judge's finding and the insurer's second argument lack a proper evidentiary foundation and are therefore speculative.

The insurer is correct that expert medical opinion is necessary to address the nature and underlying physiology of the employee's abdominal disfigurement. Certainly, there may be instances where medical evidence is unnecessary because "the cause or nature of the injury is so obvious that it is within the common knowledge and everyday experience of the general population." Lorden's Case, 48 Mass. App. Ct. 274, 280 (1999), citing Lovely's Case, 336 Mass. 512, 515-516 (1957). However, this is not one of those instances. As the insurer asserts, "[t]he complex physiological process that led to the end result on [the employee's] abdomen is not a matter of common knowledge or experience." (Ins. br. 5.) Although the parties stipulated that the indentation and the black spots were *caused* by the explosion, they did not stipulate to the *nature* of the disfigurement. In fact, the very essence of their dispute was the nature of the disfigurement, i.e., whether it was purely scar-based or not. The determination of that issue required medical evidence as to how the indentation formed, what structural changes took place, and whether the changes were subcutaneous or cutaneous.[12] The judge's findings that the disfigurement "appears to

[12] Thus, the facts here are distinguishable from those in Corriveau, supra, where the parties had stipulated that the employee's burn injury resulted in scarring. At issue in Corriveau was the validity of a regulation which limited scar-based disfigurement to scars that were

be the loss of subcutaneous tissue," and that it involves "an alteration in structure," are unsupported by *any* medical opinion and are clearly speculative. Therefore, they cannot stand. The issue presented by the employee's claim was, in the first instance, a medical one, and the judge erred by framing it solely as a legal one.

Based only on the judge's decision and the transcript of the brief hearing held on May 26, 2009, it appears both parties agreed that the issue to be decided -- the compensability of the employee's abdominal disfigurement -- was a legal one, that there was no medical issue in dispute, and that neither party would introduce expert medical evidence. As the employee always bears the burden of proving every element of his claim, Ormonde v. Choice One Communications, 24 Mass. Workers' Comp. Rep. 149 (2010), he would lose based on a simple failure of proof. However, our review of the temporary conference memorandum cover form, completed and signed by the parties at the July 1, 2008, §10A conference and contained in the board file, see Rizzo, supra, casts a different light on what transpired.

On page two of the conference memorandum, the parties identified the medical issue in dispute as: "Extent of non-scarring based disfigurement on abdomen and stomach." The two attorneys checked the box indicating they could not agree on which doctor should serve as the impartial physician, the employee's attorney checked the box indicating he was submitting medical records to be sent to the impartial examiner, and both attorneys signed that part of the memorandum. It is only at the bottom of page one that the box next to "No Impartial Exam is needed," is checked, and that notation is initialed only by the judge. As no stenographic record is made of conference proceedings, we cannot ascertain what discussion took place among the parties and the judge. We infer that before the discussion, the parties expected there would be an impartial medical examination, and after the discussion, they were persuaded otherwise. We are not willing to consign the outcome of the

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surgically caused, except in certain situations. The court struck down the regulation as inconsistent with the statute, and affirmed the board's decision that scarring on the employee's legs caused by a burn injury was not compensable under § 36(1)(k).

employee's claim for disfigurement benefits to the judge's erroneous conclusion that medical evidence was not necessary to the adjudication of that claim.[13]

Accordingly, we recommit the case to the judge for the admission of medical evidence on the nature of the abdominal disfigurement.[14] We leave it to the judge and the parties to determine whether a § 11A impartial examination is necessary, or there are legitimate reasons for bypassing that process. However, even if there are valid reasons for allowing the parties to opt out of the impartial examination, medical evidence is still necessary to address the medical issue presented in this case. 452 Code Mass. Regs. § 1.11(6)("At a hearing . . . in which the case does not involve a dispute over medical issues as defined in 452 CMR 1.02 . . . a party may offer as evidence medical reports prepared by physicians engaged by said party. . ."). See, e.g., Castillo v. M.B.T.A., 24 Mass. Workers' Comp. Rep. 351 (2010)(medical records of treating physician admitted to address closed period of claimed disability, following impartial examination opt out).

> Because we cannot tell to what extent the employee's decision [not to submit expert medical evidence] was determined by the judge's erroneous limitation [of the disfigurement issue as a legal one], both parties must be given the opportunity to submit whatever medical evidence they deem fit to support their respective positions.

Higinbotham v. Emcor Balco Co., 23 Mass. Workers' Comp. Rep. 439, 442 (2009), citing Phillips's Case, 41 Mass. App. Ct. 612, 618 (1996).

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[13] The legal question, to the extent there is one, is whether, as the insurer argues, pursuant to the holding in Corriveau, supra, the purpose of § 36(1)(k) is to exclude from the purview of disfigurement awards deformities that are not readily observable. We do not read Corriveau to stand for this proposition. The court's holding was that a now repealed adjudicatory rule defining "purely scar-based disfigurement" as surgical scarring, was inconsistent with § 36(1)(k). Referring to that statute, the court held, "the evident purpose of the statute is to limit compensation for *scarring* to those parts of the body where *scarring* is ordinarily visible." Id. Here, the very issue is whether the employee's abdominal depression is disfigurement or a scar, and the judge was aware of the distinction. See footnote 10, supra.

[14] Because the employee has not appealed, he cannot achieve a more favorable result on recommittal. Ormonde, supra at 157 n.7, and cases cited. Thus, he may not receive additional compensation for the alleged disfigurement caused by the black dots. We do not address the amount of the award under § 36(1)(k). See Adam v. Harvard Univ., supra.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **November 3, 2011**