

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 015624-09**

Mark Patnaude  
Department of Correction  
Commonwealth of Massachusetts

Employee  
Employer  
Self-insurer

**REVIEWING BOARD DECISION**  
(Judges Koziol, Costigan and Horan)

The case was heard by Administrative Judge Jacques.

**APPEARANCES**

J. Eric Chisholm, Esq., for the employee  
Vincent F. Massey, Esq., for the self-insurer

**KOZIOL, J.** The employee's appeal requires us to determine what formula should be used to calculate a proper and equitable award for non-scar based, slight disfigurement of the fifth finger of the employee's major hand pursuant to § 36(1)(k).<sup>1</sup> The judge used a formula proposed by the self-insurer, which resulted in the employee receiving a disfigurement award of \$355.31. The employee argues that the judge erred in using that formula, and should have used the formula he proposed, which would have resulted in an award of \$7,106.26. We agree the judge erred in using the formula proposed by the self-insurer; however, we do not agree that the formula proposed by the employee is proper either. For the reasons that follow, we vacate the award and order the self-insurer to pay the employee \$2,416.13 for his non-scar based, slight disfigurement of the fifth finger (digit) of his major hand.

---

<sup>1</sup> General Laws c. 152, § 36(1)(k), provides, in pertinent part:

For bodily disfigurement, an amount which, according to the decision 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.

On June 9, 2009, the employee sustained a work-related mallet fracture injury to the fifth digit of his left major hand. As a result of that injury, the employee filed a claim seeking § 36 loss of function benefits and benefits for a non-scar based disfigurement. After conference, the only dispute remaining was the proper amount of § 36(1)(k) disfigurement benefits due the employee.<sup>2</sup>

At hearing, no testimony was taken and the case was submitted to the judge on the parties' "Joint Stipulations of Fact" which, together with its two attachments,<sup>3</sup> became the only hearing exhibit. (Dec. 2; Ex. 1.) The following paragraphs of the Joint Stipulations of Fact are pertinent to the issues raised on appeal:

18. The parties agree that the Employee's left major pinky has a disfigurement.
19. The parties agree that the disfigurement to the subject pinky is of the slight category, as identified in the "Guidelines for Disfigurement and Losses of Function Under G.L. c. 152, §36" published April 24, 1992 and located on the Department of Industrial Accidents website. (Attached)
20. The parties also agree that the multiplier to be used within the slight category is 6.5 and that this figure is to be multiplied by the relevant SAWW or \$1,093.27.
21. The parties' disagreement lies in whether or not the formula for calculating disfigurement should also include the percentage of the whole hand of which the pinky consists; The employee argues it should not and the Self-insurer argues that it should.
22. The Employee argues the formula should be:  $6.5 \times \$1,093.27 = \$7,106.26$ .

---

<sup>2</sup> The parties stipulated that a December 2, 2010, conference order required the self-insurer to pay the employee a total of \$7,849.68 in § 36 benefits, representing \$743.42 for loss of function benefits pursuant to § 36(1)(f), and \$7,106.26 for non-scar based disfigurement pursuant to § 36(1)(k). The § 36(1)(f) claim has been resolved. (Ex. 1.)

<sup>3</sup> The attachments were the self-insurer's October 15, 2010 offer, pursuant to 452 Code Mass. Regs. § 1.19(3), to pay \$1,858.56 for the disfigurement claim (Offer to Pay); and, a copy of the " 'Guidelines for Disfigurement and Losses of Function Under G. L. c. 152, § 36' " (Guidelines). (Ex. 1.)

23. The Self-insurer argues the formula should be:  $6.5 \times \$1,093.27 \times 0.5 = \$355.31$ .

(Dec. 2: Ex. 1.)

The judge concluded the employee's formula produced a "nonsensical result." (Dec. 4.) First, she observed that the employee's formula did not differentiate between disfigurement to one finger and disfigurement to all fingers, finding it would not be " 'proper and equitable compensation' for an employee to receive the *exact same* benefits for a slight disfigurement to *all five* of his fingers as he would receive for a slight disfigurement to *just one* of his fingers ( $\text{SAWW} \times 6.5 = \$7,106.26$ )." (Dec. 4-5; emphasis in original.) Second, she observed that as a whole, the Guidelines provide multipliers that vary depending on the location and severity of the disfigurement. (Dec. 5.) After making this observation, the judge used the employee's formula to compare the range of benefits available for disfigurement to the *entire hand and wrist* - - providing a range from \$4,373.09 for maximum "very slight" disfigurement to \$9,292.80 for maximum "slight" disfigurement - - to the proposed award of \$7,106.26 for "slight" disfigurement of "just the *pinky finger*." She found such an award was not intended by § 36(1)(k). (Dec. 5-6; emphasis in original.) Lastly, the judge found:

[A] review of the benefits to be paid in the event of an amputated finger illustrates why the employee's interpretation of The Guidelines cannot possibly stand. Interpreted as the employee argues, the employee would only be entitled to a maximum benefit of \$1,858.56 were he to have suffered an **amputation** of his pinky finger rather than a slight disfigurement. ( $\text{SAWW } \$1093.27 \times 34$  (multiplier for amputation of major hand)  $\times 5\%$  percentage of hand = \$1,858.56). It defies commonsense to believe section 36 intent [sic] is to provide disfigurement benefits of \$7,106.26, for a slight disfigurement of the pinky finger and only \$1,858.56, for an amputation of the same finger.

Thus, I agree with the self-insurer that the only logical way to interpret The Guidelines is to take the SAWW times the slight disfigurement multiplier stipulated by the parties (6.5) times the percentage assigned to the pinky finger by The Guidelines (5%) ( $\$1093.27 \times 6.5 \times .05 = \$355.31$ ).

(Dec. 6; emphasis in original.)

The employee argues the judge erred in adopting the self-insurer's method of calculating his disfigurement award because she: 1) misunderstood the employee's claim; 2) erred in placing additional limitations on the award beyond the statutory limit of \$15,000 and those limits expressly stated in the Guidelines; and, 3) erred in calculating the § 36 benefit for disfigurement resulting from an amputation of the fifth digit.

First, the employee asserts his claim does contemplate a distinction between disfigurement to just one finger and disfigurement to all five fingers or the entire hand. Specifically, the employee argues that the multiplier chosen by the parties, 6.5 for slight disfigurement, represented the resulting disfigurement to his entire hand, not just the fifth digit. Had additional fingers been disfigured, the employee asserts the multiplier would have increased because the disfigurement of the hand would no longer be slight. (Employee br. 7-8.) Although the employee's argument has facial appeal, it was not advanced before the administrative judge.<sup>4</sup> Moreover, it is not supported by the parties' Joint Stipulations of Fact, which speak of the claimed disfigurement as "disfigurement to the subject pinky," not the entire hand. (Ex. 1.) On this record, the judge did not abuse her discretion or otherwise err in finding the parties were disputing the proper method of calculating a 6.5 slight disfigurement of only the fifth digit of the employee's hand.

We also disagree with the employee's argument that there was no rational basis for the judge to limit his benefit award by using a formula which acknowledged the fifth digit comprises a fraction, or percentage, of the entire hand. We agree in principle with the judge's underlying reasoning that the Guidelines, as well as fundamental fairness, support her determination that it is "proper and equitable" for a slight disfigurement of only the fifth digit, to translate into a monetary award that is

---

<sup>4</sup> The employee did not advance this argument in his hearing memorandum submitted to the judge on August 26, 2011. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of the board file.)

less than that for a slight disfigurement to two or more fingers, or the entire hand. Nonetheless, we agree the judge erred in calculating the benefit the employee would receive for complete amputation of the fifth digit. Because that error infected the remainder of her analysis, we must vacate the award.

We begin by noting that the non-scar based disfigurement benefit has a statutory limit of \$15,000 and that the Guidelines themselves further limit the maximum monetary award for such disfigurements to the fingers. (Ex. 1, Guidelines 6a.) The Guidelines list five categories for disfigurement of the “hand & wrist,” ranging from “very slight” to “very severe,” which have corresponding values ranging from 1 to 22. One of those values then is multiplied by the state average weekly wage (SAWW) on the date of injury, in order to arrive at a disfigurement award. (Id.) Although no multipliers are specified for disfigurement of individual fingers, after providing the range of potential multipliers for “very severe” disfigurement of the “Hand & Wrist,” the Guidelines expressly state, “(In no instance shall amounts for disfigurements to fingers exceed allowances listed for amputations listed on page 7).” Id.

Page seven of the Guidelines provides a “Schedule Of Payments For Disfigurement For The Amputation Of A Hand, Fingers, Or Parts Thereof” (Schedule). The Schedule sets forth the formula for calculating a disfigurement award for amputation of the “total hand” as  $22 \times \text{SAWW}$ , or in this case, \$24,051.94. It also provides the multipliers that are to be used for amputations of each individual finger as well as for amputations of every combination of fingers. Line thirty-two of the schedule states that disfigurement for amputation of the fifth digit is calculated as “ $7.5 \times \text{SAWW}$ .” (Id. 7.)

The judge’s reasoning, that a “proper and equitable” award for slight disfigurement of the fifth digit must be less than an award for slight disfigurement of two or more fingers, or the entire hand, incorporates a rule of proportionality that is supported by the Guidelines. For example, the Schedule’s formula for calculating the disfigurement benefit for amputation of the fifth digit uses a multiplier,  $7.5 \times \text{SAWW}$ ,

that is far less than the one used for calculating the same benefits for amputation of the entire hand,  $22 \times \text{SAWW}$ . (Ex. 1, Guidelines 7.) Where the claim is for disfigurement of individual fingers, the Guidelines for disfigurement of the hand and wrist cap the employee's recovery to those benefits set forth in the Schedule, thereby encouraging use of the Schedule's rule of proportionality when calculating non-scar based disfigurement of a single finger. In this case, the Schedule provides a disfigurement award for complete amputation of the fifth finger of \$8,199.53, ( $\text{SAWW} \times 7.5$ ), which is the ceiling for any award for non-scar based disfigurement of the fifth digit of the employee's hand. (*Id.*)

Because the employee's formula does not contain any multiplier to reflect the concept of proportionality in the disfigurement calculation, use of his formula would limit recovery for disfigurement, no matter how severe, to a sum that is less than the amount obtained by the maximum multiplier for "slight" disfigurement set forth in the Guidelines. (Ex. 1, Guidelines 6a.) As a result, under his reasoning, there could be no additional recovery where there was a moderate, severe, or even very severe disfigurement of that digit. Accordingly, we reject the employee's argument that the only limits on an award corresponding to disfigurement of a finger are the statutory cap of \$15,000.00 and the Guidelines cap for amputation of the finger, \$8,199.53.

However, in determining the percentage that should be used to accomplish the goal of proportionality, the judge referred to the formula that is used to calculate *loss of function* due to amputation of the fifth finger under § 36(1)(f); namely,  $\text{SAWW} \times 34 \times .05 = \$1,858.56$ , (Ex. 1, Guidelines 2-3), rather than referring to the formula set forth in the Schedule appearing in the disfigurement Guidelines (Ex. 1, Guidelines 7). By importing the 5% figure into the calculation of disfigurement of the hand,  $6.5 \times \text{SAWW} \times .05 = \$355.31$ , the judge erroneously determined the amount for a slight disfigurement of the fifth digit of the employee's hand.

To the extent the judge expressed concern that a loss of function award for complete amputation of the fifth digit would be less than the award for that digit's slight disfigurement, (Dec. 6), we conclude such variance was intended by the

Guidelines, (Ex. 1, Guidelines 6a). The disfigurement award for amputation of the fifth finger, \$8,199.53, is far greater than the loss of function award associated with that amputation, \$1,858.56. The variance between these numbers may be explained as an acknowledgment that the visual effect, or cosmetic impact, of a complete amputation of the fifth digit is greater than the actual loss of function associated with that amputation. In any event, the fact that there is a variance between these numbers illustrates the larger principle: that loss of function and disfigurement are completely separate, and often unrelated, results of an industrial injury. Indeed, an employee may have a large degree of loss of function with little or no disfigurement, scar based or otherwise, and vice versa. The factors that are relevant to the calculation of loss of function benefits are not necessarily relevant to the calculation of non-scar based disfigurement. The Guidelines for disfigurement direct the reader to the relevant point of reference, which is the monetary cap for disfigurement of the fifth digit due to complete amputation set forth in the Schedule, not the total amount payable for loss of function due to that amputation. (Ex. 1, Guidelines 6a.)

We view the Schedule as providing the reference point for determining what percentage of the hand is represented by the fifth digit and conclude that the same percentages should be used to calculate the value of non-scar based disfigurement to particular digits as opposed to the entire hand. Pursuant to the Schedule, the multiplier for amputation of the fifth digit, 7.5, is 34% of the multiplier for amputation of the hand, 22. As a result, the “proper and equitable” manner of calculating the employee’s § 36(1)(k) disfigurement award is,  $6.5 \times \text{SAWW}$  ( $\$1,093.27 \times .34 = \$2,416.13$ ).<sup>5</sup>

Accordingly, we reverse the decision with respect to the amount due under § 36(1)(k), and order the insurer to pay the employee \$2,416.13 for his non-scar based

---

<sup>5</sup> Unlike the employee’s formula, this formula gives full effect to the Guidelines by allowing employees to receive graduated monetary awards corresponding to the severity of the disfigurement beyond the level of the maximum award for “slight” disfigurement; allowing recovery up to \$8,199.53 for a maximum “very severe” disfigurement of the fifth digit.

**Mark Patnaude**  
**Board No. 015264-09**

disfigurement of the fifth digit of his left hand, taking credit for any benefit already paid. Because this §36(1)(k) award exceeds the amount offered by the self-insurer in its offer to pay, and the employee retained some of the benefit at issue in the appealed conference order, the employee “prevail[ed] at such hearing,” and we order the self-insurer to pay a § 13A(5) hearing fee, in the amount of \$5,311.62, the standard base hearing fee on the date of the decision, December 29, 2011.<sup>6</sup> (Ex. 1, Offer to Pay.) See Buduo v. National Grange Ins. Co., 24 Mass. Workers’ Comp. Rep. 101, 109 (2010), aff’d Buduo’s Case, 79 Mass. App. Ct. 1114 (2011)(Memorandum and Order Pursuant to Rule 1:28).

So ordered.

---

Catherine Watson Koziol  
Administrative Law Judge

---

Patricia A. Costigan  
Administrative Law Judge

---

Mark D. Horan  
Administrative Law Judge

Filed: **August 1, 2012**

---

<sup>6</sup> Circular Letter 339, issued October 4, 2011 and in effect on the date this decision was filed, increased the legal fee due an employee’s attorney to \$5,311.62. General Laws c. 152, § 13A(10)(providing for the yearly adjustment of attorney’s fees payable under § 13A[1]-[6] on October first of each year).