

NO. 23222

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

RICHARD M. MORGENSTEIN, SR., Claimant-Appellant, v.
ALL STAR-SAB JOINT VENTURE and LIBERTY MUTUAL
INSURANCE CO., Employer/Insurance Carrier-Appellee.

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS
APPEALS BOARD
(CASE NO. AB 97-538 (2-95-23522))

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Claimant-Appellant Richard M. Morgenstein, Sr.

(Morgenstein) appeals the March 6, 2000 Amended Decision and Order (the Decision) of the Labor and Industrial Relations Appeals Board of the State of Hawai'i (the Board). The Decision modified an August 12, 1997 decision of the Director of Labor and Industrial Relations (the DLIR). In pertinent part, the Decision increased Morgenstein's workers' compensation disfigurement award from \$15,000 to \$17,000.

On appeal, Morgenstein contends that the Board erred in awarding him \$17,000 for his disfigurements instead of the statutory maximum award of \$30,000. In support of this contention, Morgenstein argues that (1) the Board utilized an erroneous proportionality standard in making the Decision, under which the statutory maximum award equals a total disfigurement of

the whole body; (2) alternatively, the Board failed to utilize an articulable standard in making its disfigurement award; and (3) the photographs put in evidence before the Board depict disfigurements meriting, without more, an award of the statutory maximum compensation.

For the following reasons, we affirm the Decision.

I. Background.

On December 21, 1995, Morgenstein was employed as a journeyman plumber for Employer-Appellee All Star-SAB Joint Venture. In the course of his employment, he lost control of a company-owned vehicle. The vehicle overturned, resulting in various personal injuries.

Disfigurements resulting from the accident include (1) an abnormal gait; (2) a 6" x 5" heavily keloidal surgical scar at the dorsal, medial left foot; (3) a 3" x 1.5" scar at the lateral right ankle; (4) a 3.5" x 1" scar at the right knee; (5) a 1" scar at the right elbow; (6) a 7" x 5" skin graft at the left anterior thigh; and (7) a 5" x 2" skin graft at the left anterior thigh.

Morgenstein brought a workers' compensation claim to the DLIR, seeking compensation for, among other things, the scars and other disfiguring consequences. On August 12, 1997, the DLIR awarded Morgenstein, *inter alia*, \$15,000 for the disfigurements

resulting from his industrial injuries. Sixteen days later, Morgenstein appealed the DLIR's decision to the Board.

The Board issued a decision on February 4, 2000 that, among other things, increased the DLIR's disfigurement award from \$15,000 to \$17,000. On February 17, 2000, Morgenstein filed an application for modification of a part of the Board's February 4, 2000 decision not pertinent here. In response, the Board filed the March 6, 2000 Decision clarifying its entire February 4, 2000 decision, but leaving the \$17,000 disfigurement award unchanged. In making the Decision, the Board found and concluded as follows:

Findings of Fact

1. On December 21, 1995, [Morgenstein], an employee of ALL STAR-SAB JOINT VENTURE, was injured in a motor vehicle accident.
2. [Morgenstein] was taken by ambulance to the emergency department of Kaiser Medical Center, Moanalua, and later seen by John Frauens, M.D. [(Dr. Frauens)], an orthopedic surgeon, who diagnosed severe soft tissue avulsion injuries of the left foot, and fractures of the second and third metatarsals of the left foot.
3. Dr. Frauens irrigated and debrided the lower extremities, and performed a split-thickness skin graft to the left foot.
4. On January 10, 1996, [Morgenstein] underwent a debridement of and skin graft to the left dorsal foot with John S. Imada, M.D., a plastic surgeon.
5. On December 4, 1996, [Morgenstein] was evaluated by Robert L. Smith, M.D. [(Dr. Smith)], an orthopedic surgeon, who documented the presence of a limp, and noted that [Morgenstein] did not require routine use of an ankle-foot orthosis ("AFO"), and did not have roentgenographic cartilage interval defined

evidence of arthritis.

6. Using the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition, ("Guides"), Dr. Smith rated [Morgenstein's] permanent partial impairment at 16% of the left foot, and at 7% of the whole person with reference to Table 36 "Lower Limb Impairment from Gait Derangement."

7. Table 36, page 76 of the Guides, Lower Limb Impairment from Gait Derangement, requires both an antalgic limp with shortened stance phase and documented moderate to advanced arthritic changes of the hip, knee, or ankle, to qualify for the 7% whole person impairment.

8. In his correspondence dated June 17, 1997, Dr. Smith amended his December 4, 1996 evaluation to delete the 7% whole person impairment. Dr. Smith explained that his original designation of 7% impairment for Gait Derangement was in error, because [Morgenstein] did not have the required documented arthritic changes to qualify for the 7% whole person impairment.

9. Although [Morgenstein] was stable for rating purposes, there is a potential for further skin breakdown. [Morgenstein] is a plumber, and the use of shoes causes ongoing skin breakdown. Further surgery may be required to control future skin breakdown.

10. As a result of the injury, [Morgenstein] now experiences left ankle fatigue, discomfort, and swelling at the end of the day, cramping on the posterolateral aspect of the left foot and ankle with increased activity, aching in his left foot and ankle in cold weather, and spasms in his peroneal muscles along the lateral aspect of his left leg.

11. Prior to December 21, 1995, [Morgenstein] did not experience any left ankle or foot symptoms.

12. [Morgenstein's] work injury has adversely affected his activities of daily living. [Morgenstein] is no longer able to coach Pop-Warner football, play basketball with his

children, walk lengthy distances and for long periods of time, and participate in recreational weightlifting.

13. [Morgenstein] is also no longer able to enjoy regular visits to the beach, because doing so causes particles to collect in the numerous folds of scarred skin on his left lower extremity. The collection of particles causes [Morgenstein] pain and requires removal with fingers, brushes, and tweezers.

14. As a result of the December 21, 1995 work injury, [Morgenstein] has abnormal gait; 6" x 5" heavily keloidal surgical scar, dorsal/medial left foot; a 3" x 1-1/2" scar, lateral right ankle; a 3-1/2" x 1" scar, right knee; a 1" scar, right elbow; and a 7" x 5" and 5" x 2" skin graft, left anterior thigh.

CONCLUSIONS OF LAW

1. Based on Dr. Smith's impairment evaluation of December 4, 1996, and his amendment of June 17, 1997, and the impact of the work injury upon [Morgenstein's] activities of daily living, we conclude that [Morgenstein] is entitled to benefits for 36% permanent partial disability of the left foot, as a result of this December 21, 1995 work injury.

2. We conclude that [Morgenstein] sustained disfigurement in the amount of \$17,000, as a result of his work injury of December 21, 1995.

On March 3, 2000, three days before the Board issued the Decision, Morgenstein filed a notice of appeal of the Board's February 4, 2000 decision to the Hawai'i Supreme Court.

Although premature pending disposition of his February 17, 2000 application for modification, Morgenstein's notice of appeal was effective and timely as to the Board's March 6, 2000 Decision under Hawai'i Rules of Appellate Procedure Rule 4(a)(2) (2000): "In any case in which a notice of appeal has been

filed prematurely, such notice shall be considered as filed immediately after the time the judgment becomes final for the purpose of appeal."

II. Standards of Review.

A. Agency Decisions.

"Judicial review of administrative agency decisions, in particular the decisions of the Board, is governed by [Hawai'i Revised Statutes] (HRS) § 91-14 (1993)." Bocalbos v. Kapiolani Medical Center, 93 Hawai'i 116, 123-24, 997 P.2d 42, 49-50 (App. 2000) (footnote and citations omitted). HRS ch. 386 governs workers' compensation claims. The pertinent part of HRS § 386-32(a) (Supp. 2000) provides that

[i]n cases of personal injury resulting in disfigurement the director may award compensation not to exceed \$30,000 as the director deems proper and equitable in view of the disfigurement. Disfigurement shall be separate from other permanent partial disabilities and shall include scarring and other disfiguring consequences caused by medical, surgical, and hospital treatment of the employee[.]

(Emphasis supplied.) HRS § 91-14(g) (6) (1993) provides:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

. . . .

- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Accordingly, "an agency's exercise of discretion is reviewable under subsection (6)." Potter v. Hawai'i Newspaper Agency, 89 Hawai'i 411, 422, 974 P.2d 51, 62 (1999).

In addition, the Hawai'i Supreme Court has stated that [appellate] review is further qualified by the principle that the agency's decision carries a presumption of validity and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences.

Mitchell v. State, Dept. of Educ., 85 Hawai'i 250, 254, 942 P.2d 514, 518 (1997) (citation and internal quotation marks omitted).

B. Statutory Interpretation.

The interpretation of a statute is a question of law reviewable de novo.

Furthermore, our statutory construction is guided by established rules:

When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

This court may also consider the reason and the spirit of the law, and the cause which

induced the legislature to enact it to discover its true meaning.

Korsak v. Hawaii Permanente Medical Group, 94 Hawai'i 297, 303, 12 P.3d 1238, 1244 (2000) (citations, ellipses, brackets, and internal quotation marks omitted).

III. Discussion.

A. Application of the Statutory Maximum Limit.

Morgenstein undisputedly suffered a work-related injury on December 21, 1995 that left scars on his body. At issue in this appeal is the amount of workers' compensation the scars and related disfiguring consequences merit.

Morgenstein's primary contention on appeal is that the Board erred in employing a strict proportionality approach to the statutory maximum compensation of \$30,000. He speculates that the Board interpreted the \$30,000 statutory cap amount to be comparable to a total disfigurement of the entire body. He argues that this erroneous interpretation of the statutory cap led the Board to mistakenly conclude that he was entitled to a proportional \$17,000 award for his merely partial disfigurement.

In his opening brief, Morgenstein surmises:

The [Board] found . . . that [Morgenstein's] disfigurement award should receive an award [(sic)] of disfigurement compensation in the amount of \$17,000.00. The [Board] did not enunciate it's [(sic)] standards, but in the circumstances, is likely looking at the \$30,000.00 maximum allowable or upper limit on disfigurement compensation as a figure representing an amount that a much worse or

"total" disfigurement of the entire body might merit. One could speculate that the [Board] would from that render an award to [Morgenstein] in this case as only a percentage share of what "total" disfigurement might be.

While we agree with Morgenstein's contention that the \$30,000 cap should not be mechanically equated with a total disfigurement of the whole body, we disagree with his contention that the Board applied that improper standard below.

As is evident from the argument quoted above, Morgenstein's point is clearly based upon speculation. He cites no evidence as to how the Board arrived at its \$17,000 award. Nor does he show that the Board made this or any previous awards based upon an understanding that the statutory cap equals a total disfigurement of the entire body. Our independent review of the record reveals nothing which might indicate that the Board utilized an improper standard of decision.

Indeed, there is nothing in the record to indicate how either the DLIR or the Board arrived at their respective disfigurement awards. That circumstance leads us to Morgenstein's next point on appeal.

B. The Board's Lack of an Articulate Standard for Decision.

Morgenstein next argues that the Board must utilize "some articulable standard" in arriving at a disfigurement award and hence, the Board's failure to articulate such a standard in this case constituted error. However, we observe that

[d]iscretion denotes the absence of a hard and fast rule. When invoked as a guide to a judicial action it means a sound discretion, exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

Ariyoshi v. HPERP, 5 Haw. App 533, 541-542, 704 P.2d 917, 924-25 (1985). The foregoing is especially apposite in the determination of just compensation for disfigurement, in which aesthetic considerations play such an important part.

C. The Photographs (Exhibits 1 through 5).

The record contains five photographs depicting the gravity of Morgenstein's injuries. These pictures were taken on May 1, 1996, 132 days after the incident, and are labeled Exhibits 1-5.

Morgenstein argues, under "a more remedial 'reasonable person' standard" -- for which he provides no provenance, that the photographs alone dictate a disfigurement award of at least \$30,000. We conclude otherwise.

"A disfigurement is that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner." Superior Mining Co. v. Industrial Commission et al., 141 N.E. 165, 166 (Ill. 1923). In addition, "[b]efore compensation can be awarded . . . there must be a disfigurement,

and that disfigurement must be both permanent and serious." Id. (emphasis supplied).

No doubt, judging from the photographs, Morgenstein's injuries did at some point in time severely impair his physical appearance. What the photographs lack, however, is any depiction of Morgenstein's permanent disfigurement.

His medical treatment lasted far longer than the 132 days preceding the taking of the photographs. He met with a doctor nearly every month after the injury over a period much longer than the first 132 days; his last visit was recorded on February 9, 1998 -- over 25 months after the incident. The record reveals evolving doctors' evaluations demonstrating that significant further healing occurred after the photographs were taken.

On June 4, 1996, approximately one month after the photographs labeled Exhibits 1, 2, and 5 (of the left ankle) were taken, Dr. Frauens noted that "[t]here was still an open wound over the medial malleolus [left ankle]." These findings concur with Exhibit 2's depiction of a white, yellow, gray, pink, red, black and green wound not entirely covered with skin. Six months later, on December 4, 1996, Dr. Smith examined the medial malleolus and surrounding areas. He stated that

[t]he left foot and ankle area has a skin graft site measuring 6 inches along the dorsum, 5 inches along the plantar surface, and 4 inches along the Achilles area. There are distal keloid scars. There is no skin breakdown in the graft

at the present time, although the graft is pitted pigmented.

The skin graft placed on Morgenstein's left anterior thigh depicted in Exhibit 3 was described by Dr. Frauens as "healing nicely" on April 1, 1996. Then, on December 4, 1996, Dr. Smith described the skin grafts as "well healed". Exhibit 4 suggests that the right knee was not completely healed on May 1, 1996. On December 4, 1996, it was described as having a 3-1/2 x 1 inch transverse scar.

Clearly, the May 1, 1996 photographs do not adequately represent Morgenstein's permanent disfigurement resulting from the work-related injury of December 21, 1995. Hence, they cannot support, without more, a maximum \$30,000 award, as Morgenstein would have it.

IV. Conclusion.

Upon an independent review of the record, we cannot conclude that the Board abused its discretion in awarding \$17,000

for Morgenstein's disfigurements. Accordingly, we affirm the Board's March 6, 2000 amended decision and order.

DATED: Honolulu, Hawaii, June 28, 2001.

On the briefs:

Richard C. Monks for
claimant-appellant.

Chief Judge

Brian G. S. Choy
(Gronau & Choy)
for employer/insurance
carrier-appellee.

Associate Judge

Associate Judge