

**FILED**

OCT 6 2008

WORKERS'  
COMPENSATION COURT

NOT FOR OFFICIAL PUBLICATION  
IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

**FILED**  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA

OCT 2 2008

**MICHAEL S. RICHIE**  
CLERK

DON W. FOLDS, )  
)  
Petitioner/Appellant, )  
)  
vs. )  
)  
I C OF OKLAHOMA, LLC and THE )  
WORKERS' COMPENSATION )  
COURT, )  
)  
Respondents/Appellees. )

W.C.C.# 2005-550Q

Case No. 105,540

EN BANC PANEL: J. Blanchard  
J. Edwards  
J. McCormick - Dissents

PROCEEDING TO REVIEW AN ORDER OF A THREE-JUDGE PANEL OF  
THE WORKERS' COMPENSATION COURT

HONORABLE H. THOMAS LEONARD, TRIAL JUDGE

**REVERSED**

W.C. Doty  
THE BELL LAW FIRM  
Norman, Oklahoma

For Petitioner/Appellant

David J.L. Frette  
HASTINGS & ASSOCIATES  
Tulsa, Oklahoma

For Respondent/Appellee

OPINION BY DOUG GABBARD II, PRESIDING JUDGE :

Petitioner, Don W. Folds (Claimant), appeals a decision of the workers' compensation court three-judge panel denying him compensation for disfigurement. For the following reasons, we reverse the panel's decision.

**FACTS**

In October 2004, Claimant sustained a compensable back injury while working for I C of Oklahoma, LLC (Employer). As a result, Claimant underwent several surgeries. His first surgery was a take-down pseudoarthrosis and fusion with orthopedic instrumentation at the L5-S1 position of his lumbar spine. Months later, the hardware was surgically removed. In December 2005, after it was determined that the fusion had failed, surgeons cut through Claimant's abdomen and back, and performed an anterior and posterior fusion. After this hardware was also removed, it was determined that the second fusion was successful.

Claimant's timely filed worker's compensation claim was tried in September 2007. Claimant testified the first fusion left him with a seven-to-eight-inch scar near a previous surgical scar on his back. He also testified the second fusion left a seven-inch scar on his stomach. Claimant's expert, Dr. Kenneth R. Trinidad, reported that he had examined Claimant in November 2006. He verified that Claimant had

“disfigurement of the abdomen” consisting of a scar 13 centimeters long (more than five inches) which was caused during the second fusion.

The workers’ compensation court trial judge found that Claimant had sustained a compensable injury to his lumbar spine (aggravation of a pre-existing condition), resulting in a 29% permanent partial disability (PPD). The court further found:

THAT as a result of said injury, claimant suffered serious and permanent disfigurement to the ABDOMEN for which claimant is entitled to recover the sum of \$10,000.00.

Employer filed a Request for Review, challenging both awards. As to the disfigurement award, Employer asserted: (1) the Workers’ Compensation Act does not allow an award for PPD and disfigurement for the same body part; and (2) the award was “shockingly excessive” because Claimant failed to show any harm, and the trial judge did not observe the scar. In a 2-to-1 decision, the three-judge panel affirmed the PPD award, but “denied” the disfigurement award without explanation.

Claimant seeks our review.

#### STANDARD OF REVIEW

Generally, a decision of the workers’ compensation court will be affirmed on appeal if it is supported by any competent evidence. *Parks v. Norman Mun. Hosp.*, 1984 OK 53, ¶ 2, 684 P.2d 548, 549.

## ANALYSIS

In his only proposition of error, Claimant asserts that the Workers' Compensation Act authorizes benefits for disfigurement of parts of the body (here, the abdomen) which are not the subject of the permanent disability benefits (here, the back), that he proved a serious and permanent disfigurement, and the panel's denial of compensation is not supported by any competent evidence or the law. We agree.

Title 85 O.S. Supp. 2007 § 22 (3) of the Oklahoma Workers' Compensation Act's "Schedule of Compensation" provides in pertinent part:

In case of an injury resulting in serious and permanent disfigurement, compensation shall be payable in an amount to be determined by the Court, but not in excess of Twenty Thousand Dollars (\$20,000); provided, that compensation for permanent disfigurement shall not be in addition to the other compensation provided for in this section, but shall be taken into consideration in fixing the compensation otherwise provided.

Clearly, disfigurement "is a separate and independent element of compensation, awarded in conjunction with a compensable injury." *Safeway Stores, Inc. v. Hart*, 1976 OK 76, ¶ 10, 550 P.2d 1327, 1329. While a claimant cannot be awarded benefits for disfigurement for those parts of the body which constitute the permanent total disability, he or she may be awarded benefits for disfigurement for parts of the body which are not the subject of the permanent disability. *Seneca Coal Co. v. Carter*,

1922 OK 90, 205 P. 495; *G & G Steel Erectors, Inc. v. Gutierrez*, 1984 OK CIV APP 26, 683 P.2d 543; *Yaffee Metals v. Quick*, 1996 OK CIV APP 16, 918 P.2d 749.

Both parties rely on *McDonald v. M & S Construction Company*, 1994 OK CIV APP 32, 871 P.2d 1389,<sup>1</sup> where the workers' compensation court awarded the claimant permanent total disability benefits for a low back injury, and also awarded him \$1,200 disfigurement benefits for a scar caused by a bone graft taken from his right hip to repair his back. In sustaining the trial tribunal, the Court of Civil Appeals, stated:

The award for disfigurement to Claimant's hip was clearly not for disfigurement resulting from injury to his back, the subject of the permanent total disability. Therefore, the award of benefits for permanent disfigurement is affirmed.

*Id.* at ¶ 18, 871 P.2d at 1393.

Like the claimant in *McDonald*, Claimant here sought disfigurement benefits for a scar caused during surgery to repair an injury to his back. The disfigurement award for the abdominal scar was a separate and independent item of compensation, not included within the PPD award for Claimant's back injury. In such a case, a disfigurement award is clearly authorized by the Workers' Compensation Act.

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<sup>1</sup> A portion of *McDonald* not related to the issues before us was overruled by the Supreme Court in *Special Indemnity Fund v. Weber*, 1995 OK 43, 895 P.2d 292.

Claimant also argues that there was indisputable evidence that he had a serious and permanent disfigurement resulting from the five- to seven-inch scar on his abdomen, and no competent evidence to support the panel's total denial of disfigurement benefits.

A scar is a mark left on the skin after a wound has healed. By definition, every scar involves some degree of disfigurement. However, under § 22(3), benefits are only payable when a disfigurement is "serious and permanent." If a scar is serious and permanent, it does not matter where it is located on a claimant's body. The statutory language no longer restricts such awards to certain body parts, and Oklahoma appellate courts have sustained awards for scars on the head, face, hands, and hips. *See, e.g., Brunstetter Motor Co. v. Brunstetter*, 1934 OK 401, 35 P.2d 694; *Seneca Coal Co. v. Carter, supra*; *Comar Oil Co. v. Sibley*, 1927 OK 457, 261 P. 926; *Arrow Gasoline Co. v. Holloway*, 1927 OK 52, 254 P. 98; *Ford Motor Co. v. Farmer*, 1930 OK 494, 293 P.191; and *McDonald v. M & S Const. Co., supra*.

In this case, Claimant's abdominal scar was noticeable and of substantial length. We conclude that any reasonable person would find a five- to seven-inch scar "serious." In fact, Oklahoma appellate courts have approved disfigurement awards for much smaller scars. In addition to *McDonald v. M&S Construction Co., supra*, such cases include *Kahl & Smiley Drilling Co. v. Garrard*, 1931 OK 391, 1 P.2d 151

(\$400 disfigurement award for two facial scars which were one-fourth and one-half inch in length); *Black Sivalls & Bryson, Inc. v. Homier*, 1944 OK 189, 148 P.2d 166 (\$250 award for one facial scar one- to one-half inch long); *Grinnell Co. v. Smith*, 1950 OK 153, 218 P.2d 1043 (\$400 disfigurement award for three scars of ½”, 1” and 1½” and lost teeth); *G & G Steel Erectors, Inc. v. Gutierrez, supra* (\$1,250 disfigurement award for a four-inch scar on the claimant’s collar bone).

The evidence also established that Claimant’s disfigurement was “permanent.” Two years after the surgery, Claimant testified that he still had the scar. Dr. Trinidad verified the existence of the scar. In *Kahl & Smiley Drilling Co.*, the Supreme Court noted in its Syllabus:

Where the evidence before the Industrial Commission discloses that claimant in the course of his employment received two cuts from particles of glass, one under his eye one-fourth of an inch in length and one on his cheek one-half of an inch in length causing scars which were plainly visible and were of six months duration at the time of the hearing, this court will not reverse an award in favor of claimant for serious and permanent disfigurement on the ground that there was no expert evidence offered to establish the permanency of the disfigurement. (Emphasis added).

1931 OK 391 at ¶ 0, 1 P.2d at 151.

Claimant proved the fact of his serious and permanent disfigurement by his own testimony and the testimony of his expert. This proof was undisputed because Employer failed to present any controverting evidence. In fact, Employer’s attorney

did not dispute that Claimant had a serious, permanent disfigurement either at trial or on appeal before the panel.<sup>2</sup> Employer merely argued that two awards were not authorized, and the amount of the award was not justified by Claimant's proof. In the latter regard, Employer noted that Claimant failed to present proof of harm or loss of income, and the trial court did not observe the scar. We find no such evidentiary requirements.

Section 22(3) does not require proof of diminished earning capacity before disfigurement benefits may be awarded, and we are not authorized to read such a requirement into the statute. *See Grimes Gasoline Co. v. Taylor*, 1931 OK 646, 4 P.2d 688; *Grinnell Co. v. Smith, Supra*. In fact, neither the statute nor caselaw mandates consideration of any particular factors in making such awards. To the contrary, workers' compensation courts have "wide discretion" in granting such benefits, as long as those benefits do not exceed the statutory maximum. *Peerless Rock Co. v. Bowers*, 1954 OK 59, ¶ 8, 267 P.2d 556, 558. Because of this discretionary authority,

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<sup>2</sup> At trial, Employer's attorney told the court: "The doctor indicates there's fusion—I mean, there's disfigurement there. I know from what you indicated earlier before we went on the record that you might be inclined to award disfigurement for that. I'll just, on the record, make the request that we believe it's part of the surgery and not in addition to, that you can only get PPD and not both." In its Request for Review, Employer made a similar claim and also asserted that the \$10,000 award was "shockingly excessive." Neither allegation of error challenged the trial court's finding that Claimant's disfigurement was "serious and permanent," and, therefore, Employer arguably waived any error based thereon. See Rule 60(A)(3)&(4), Rules of the Workers' Compensation Court, 85, O.S. Supp. 2007, Ch. 4, App.



the Supreme Court has held that when there is evidence showing the nature and extent of a permanent disfigurement, it is not necessary that direct evidence as to the amount of damages be introduced in order to sustain an award. *Cameo-Blackstone Coal Co. v. Hardy*, 1929 OK 204, 277 P. 937. For this reason, Oklahoma appellate courts have approved a wide range of disfigurement awards, including some equivalent to the amount awarded in this case.<sup>3</sup> Indeed, a basic tenet of workers' compensation law is that a trial court's factual determination should not be disturbed "[a]s long as the findings of the lower court are not incompatible with the overall evidence, as accepted or rejected." *TRW/Reda Pump v. Brewington*, 1992 OK 31, ¶ 27, 829 P.2d 15, 26-7. Furthermore, when there is no conflict in the evidence, and no opposite inferences may be drawn from the undisputed proof, the question is one of law. *Lanman v. Okla. County Sheriff's Office* 1998 OK 37, ¶ 6, 958 P.2d 795, 798.

In this case, Claimant produced indisputable proof of a serious and permanent disfigurement, and no controverting evidence was introduced. When a claimant proves that he or she has received a serious and permanent disfigurement, § 22(3) provides that "compensation shall be payable." Thus, while the panel may have had discretion to reduce the award, it had no authority to totally deny those benefits. Its

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<sup>3</sup> We have exhaustively reviewed published (and unpublished) Oklahoma appellate cases involving disfigurement scars, and note a wide range of awards, including recent awards of \$14,500 for scars on four body parts, \$10,000 for disfigurement of the hand, \$1,200 for a scar on the hip, and \$7,500 for scars on the left calf.

denial was not compatible with or supported by the law or the evidence, and must be reversed.

### CONCLUSION

The panel's decision is reversed, and the disfigurement award is reinstated.

REVERSED.

RAPP, C.J., and BARNES, J., concur.

October 2, 2008