

CASE NO. 5860 CRB-2-13-7  
CLAIM NO. 200170402

: COMPENSATION REVIEW BOARD

MICHAEL F. DUFFY  
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION  
COMMISSION

v.

: JULY 2, 2014

INTERNATIONAL PAPER CO.  
EMPLOYER

and

SEDGWICK CMS, INC.  
INSURER  
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Howard B. Schiller, Esq.,  
55 Church Street, PO Box 699, Willimantic, CT 06226.

The respondents were represented by Michael V. Vocalina,  
Esq., Cotter, Cotter & Mullins, LLC, 6515 Main Street,  
Suite 10, Second Floor, Trumbull, CT 06611.

This Petition for Review from the June 28, 2013 Finding  
and Award in Part/and Dismissal in Part of the  
Commissioner acting for the First District was heard  
January 24, 2014 before a Compensation Review Board  
panel consisting of the Commission Chairman John A.  
Mastropietro and Commissioners Stephen B. Delaney and  
Michelle D. Truglia.

## OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Award in Part/and Dismissal in Part (“Finding”) which determined that the scars on his foot were not eligible for a scarring award pursuant to § 31-308(c) C.G.S. The claimant argues that this decision was in error as he believes the scars on his foot impede his ability to work. After review of this decision and based on the facts of this case particularly, where the amputation of two toes has led to the claimant presently being adjudged as totally disabled, we believe that the trial commissioner could reasonably have denied a scar award. We affirm the commissioner’s Finding.

The following facts are pertinent to our discussion. The claimant suffered a crushing injury to his left foot on January 18, 2010 which led to amputation of two toes. This resulted in deformity and disfigurement of his left foot and his left foot now has fleshy regions replacing the amputated toes causing the claimant difficulty in wearing shoes. The claimant also has discoloration of his left foot due to his crush injury which is permanent and significant disfigurement. He also has been diagnosed with Complex Regional Pain Syndrome (CRPS) and/or Reflex Sympathetic Dystrophy (RSD) and is presently receiving temporary total disability benefits for the January 18, 2010 injury.

The claimant testified at the formal hearing as to the impact of the injury. He testified he has difficulty standing on his left foot, lacks a ball of the foot, and he can’t do any activities for more than 30 to 45 minutes without having to take weight off his left foot. He stated he has to wear special shoes and the skin on the bottom of his foot is tight and sensitive. He treats his foot by applying cream and taking Neurontin once or twice a week. The claimant also testified as to his job searches and further testified that he never

showed his foot to any potential employer as no one had asked. The claimant's wife also testified at the hearing and corroborated the claimant's testimony.

The trial commissioner also noted that two physicians, Dr. Biren Chokshi and Dr. Robert Boolbol, had examined the claimant and offered medical opinions as to his condition. Dr. Chokshi opined "the patient is unable to work secondary to his left foot crush injury that occurred on 1/18//2010," Findings, ¶ 16, and was unable to perform even sedentary work. Dr. Chokshi opined the claimant was completely disabled and this was likely to be permanent. Dr. Boolbol diagnosed the claimant with Traumatic Amputation and Complex Regional Pain Syndrome and opined that he did have a work capacity and should avoid bending, lifting and twisting and also limit weight-bearing in regards to his left foot.

Based on these subordinate facts the trial commissioner concluded that the claimant sustained a compensable injury that included amputation of two toes, and that the claimant submitted a timely claim for a scar award under the statute. The commissioner also found the claimant had been receiving temporary total disability benefits since the injury. The commissioner further found "the Claimant's inability to work is caused by the loss of and/or loss of use of his foot and not the disfigurement or scar of the same." Conclusion, ¶ G. The commissioner also concluded, "[b]ased on the totality of the evidence in this matter, I find the injury itself, not the scarring and/or disfigurement, is not allowing the Claimant to return to gainful employment." Conclusion, ¶ J. Therefore, the commissioner concluded "the Claimant has not met his burden of proof in his claim that the disfigurement and/or scarring of the Claimant's left

foot and/or toes handicaps him in obtaining or continuing to work.” Conclusion, ¶ L. As a result, the commissioner dismissed the claim for a scar award.

The claimant filed a Motion to Correct seeking to add additional findings as to the impact the injury had on the claimant’s ability to walk and the types of shoes available to the claimant. The trial commissioner granted those corrections. The trial commissioner denied the corrections sought by the claimant that sought to reach conclusions that the claimant’s scars were an impediment to the claimant seeking employment, and therefore, were eligible for an award under the statute. The claimant then commenced the instant appeal.

On appeal, we generally extend deference to the decisions made by the trial commissioner. “As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did.” Daniels v. Alander, 268 Conn. 320, 330 (2004). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing and Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People’s Savings Bank, 207 Conn. 535, 539 (1988). In addition, the burden of proof in a workers’ compensation claim for benefits rests with the claimant. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440 (2001).

The claimant argues that he presented evidence that the trial commissioner credited and included in the Finding via the Motion to Correct that the scar on his foot impeded his job opportunities. As the claimant views the law, having found this evidence

probative the trial commissioner was obligated to grant an award for the scar. Given the facts herein we are not persuaded.

In order for the commissioner to issue a scar award the commissioner must be satisfied the nature of the injury is within the scope of the statute. The statute, § 31-308(c) C.G.S., reads as follows.

(c) In addition to compensation for total or partial incapacity or for a specific loss of a member or use of the function of a member of the body, the commissioner, not earlier than one year from the date of the injury and not later than two years from the date of the injury or the surgery date of the injury, may award compensation equal to seventy-five per cent of the average weekly earnings of the injured employee, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to said section 31-310, but not more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309, for up to two hundred eight weeks, for any permanent significant disfigurement of, or permanent significant scar on, (A) the face, head or neck, or (B) on any other area of the body which handicaps the employee in obtaining or continuing to work. The commissioner may not award compensation under this subsection when the disfigurement was caused solely by the loss of or the loss of use of a member of the body for which compensation is provided under subsection (b) of this section or for any scar resulting from an inguinal hernia operation or any spinal surgery. In making any award under this subsection, the commissioner shall consider (1) the location of the scar or disfigurement, (2) the size of the scar or disfigurement, (3) the visibility of the scar or disfigurement due to hyperpigmentation or depigmentation, whether hypertrophic or keloidal, (4) whether the scar or disfigurement causes a tonal or textural skin change, causes loss of symmetry of the affected area or results in noticeable bumps or depressions in the affected area, and (5) other relevant factors. Notwithstanding the provisions of this subsection, no compensation shall be awarded for any scar or disfigurement which is not located on (A) the face, head or neck, or (B) any other area of the body which handicaps the employee in obtaining or

continuing to work. In addition to the requirements contained in section 31-297, the commissioner shall provide written notice to the employer prior to any hearing held by the commissioner to consider an award for any scar or disfigurement under this subsection.

We look to the terms of the statute where scars that are not on the face, head or neck, may not be eligible for a scarring award unless the scar “handicaps the employee in obtaining or continuing to work.” Our precedent herein is clear. In McClain v. Marketstar Corporation, 5604 CRB-4-10-11 (October 25, 2011) and Atkinson v. United Illuminating Company, 5064 CRB-4-06-3 (April 19, 2007) the claimants offered evidence of having sustained significant scars that were not on their face, head or neck, but both claimants had returned to their jobs and had not sustained any identifiable impediment to their occupational prospects. In both cases, we determined that the statute barred an award for such scars.

In the present case we have a mirror image. The claimant has not returned to work but an examination of the medical evidence could lead a reasonable fact finder to conclude the claimant’s disfigurement is not the proximate cause of his inability to perform gainful employment. The trial commissioner concluded that the initial injury and not the subsequent scar rendered the claimant totally disabled. When the claimant sought to add the conclusion that the scar impacted his employment prospects the commissioner rejected those corrections. We conclude the trial commissioner was not persuaded by this argument. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008). We note that it is black letter law that, “it is the trial commissioner’s function to assess the weight and credibility of medical reports and testimony. . . .” O’Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999). We find the

commissioner's conclusion herein was based on medical evidence that he found persuasive.

Our reading of the statute is, when dealing with a scar not on the head, neck or face, that *if* the claimant's scar contributed to the claimant's difficulty in obtaining employment, then an award under the statute may issue. If, however, the claimant has such a scar but the proximate cause of the claimant's inability to obtain employment is the injury itself, the trial commissioner may decide to deny the additional award available under the statute. The claimant argues that this constitutes an unreasonable interpretation of the statute and unduly restricts those claimants who are totally disabled, as they are unable to obtain employment. Claimant's Brief, pp. 9-10. While the claimant may argue this is not consistent with a "humanitarian reading" of our Act, "[b]ecause of the statutory nature of our workers' compensation system, policy determinations as to what injuries are compensable and what jurisdictional limitations apply thereto are for the legislature, not the judiciary or the board, to make." Stickney v. Sunlight Construction, Inc., 248 Conn. 754, 761 (1999). We have held that the trier of fact is the party who must determine proximate cause. See Tyskiewicz v. Danbury, 5839 CRB-7-13-5 (April 4, 2014). We do not find the trial commissioner's analysis of the facts of this case and the law to be in error.<sup>1</sup>

The claimant cites Rogulski v. UTC/Pratt & Whitney Aircraft, 15 Conn. Workers' Comp. Rev. Op. 182, 2113 CRB-2-94-7 (April 1, 1996) as standing for the proposition

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<sup>1</sup> The claimant's position is that the trial commissioner's interpretation of the statute could create a lesser burden for those claimants with a work capacity pursuant to § 31-308(a) C.G.S. to establish eligibility for an award under § 31-308(c) C.G.S. than those awarded total disability benefits under § 31-307 C.G.S. This decision, however, is a factual decision which is committed to the trial commissioner notwithstanding whether the claimant is totally or partially disabled. Moreover, we do not find that the commissioner's application of the statute is inconsistent with the stated purpose of Public Act 93-228. Mello v. Big Y Foods, Inc., 265 Conn. 21, 26-28 (2003).

that a scarring award should be granted as additional compensation for an injury creating total disability; as the different types of compensation do not constitute a “double recovery.” We are not persuaded as Rogulski can be distinguished from this case. The claimant in Rogulski was injured on October 15, 1981 and therefore the analysis in that case governed the scarring award statute in place prior to the adoption of Public Act 93-228. We specifically noted in Rogulski that the revised act limited recovery for scars not impacting the face, head or neck, “[t]hus, the distinction between disfigurement and disability was reemphasized in the context of narrowing eligibility for scarring awards.” Id. While we noted in Rogulski that there is no reason a claimant cannot receive a scar award concurrently with indemnity benefits; we find no rationale in that case that mandates that a trial commissioner **must** award both types of benefits; in particular when a claimant lacks a work capacity.

We note that prior to the enactment of Public Act 93-228 there were numerous reported cases addressing the situation of when it was appropriate to issue a scarring award to a totally disabled claimant. See Scalora v. Dattco, Inc., 1 Conn. Workers’ Comp. Rev. Op. 203, 157 CRD-6-82 (November 8, 1982), *reversed & remanded*, 39 Conn. Sup. 449 (1983) and Smith v. State/Department of Environmental Protection, 3 Conn. Workers’ Comp. Rev. Op. 69, 78 CRD 2-81 (September 11, 1986). These cases are still good law for the proposition that an award for scarring may be granted to a totally disabled claimant and such an award may be paid concurrently with a claimant’s weekly benefits, and not consecutively with such benefits. See also Ancona v. Norwalk, 8 Conn. Workers’ Comp. Rev. Op. 49, 810 CRD-7-89-1 (February 26, 1990), *aff’d*, 217 Conn. 50, 55 (1991). However these cases do not address the inquiry the commissioner



must perform in determining whether the claimant may receive a scarring award under the revised statute. We are satisfied that in this case the commissioner reached a reasonable decision on that issue.

We do not find the trial commissioner's decision, limited to the facts herein, misapplied the law. We affirm the Finding.

Commissioners Stephen B. Delaney and Michelle D. Truglia concur in this opinion.