IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 11

WCC No. 9909-8321

RAYMOND OSTERMILLER,

Petitioner,

vs.

EMPLOYERS INSURANCE OF WAUSAU MUTUAL COMPANY,

Respondent/Insurer for

ECOLAB, INCORPORATED,Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: As the result of a work-related injury, claimant underwent an anterior cervical fusion, involving a horizontal surgical incision on the front of his neck, beginning near his Adam's apple. Claimant sought benefits for disfigurement under section 39-71-708, MCA (1995), which insurer refused to pay on ground scar was not a "serious disfigurement" under the statute.

Held: For a surgical incision, the scar is well-healed, blends relatively well with the skin of claimant's neck, and may be considered minimal and non-disfiguring by a surgeon. The scar is, however, noticeable at conversational distance, transverses the full front, right side of claimant's neck, and is likely to cause people to ask about it. In addition, claimant testified the scar is sensitive to sunlight and appears as a red streak against his neck in the summer. Claimant awarded $1,000 (statutory maximum is $2,5000).

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-708.** As the result of work-related injury, claimant underwent an anterior cervical fusion, involving a horizontal surgical incision on the front side of his neck, beginning near his Adam's apple. For a surgical incision, it is well-healed, blends relatively well with the skin of claimant's neck, and may be considered minimal and non-disfiguring by a surgeon. While the scar does not involve keloid or other raised tissue, it is noticeable at conversational distance, transverses the full front, right side of his neck, and is likely to cause people to ask about it. Also, claimant testified the scar is

sensitive to sunlight and appears as a red streak against his neck during summer months. Claimant awarded $1,000. (Statutory maximum $2,500.)

Benefits: Disfigurement. As the result of work-related injury, claimant underwent an anterior cervical fusion, involving a horizontal surgical incision on the front side of his neck, beginning near his Adam's apple. For a surgical incision, it is well-healed, blends relatively well with the skin of claimant's neck, and may be considered minimal and non-disfiguring by a surgeon. While the scar does not involve keloid or other raised tissue, it is noticeable at conversational distance, transverses the full front, right side of his neck, and is likely to cause people to ask about it. Also, claimant testified the scar is sensitive to sunlight and appears as a red streak against his neck during summer months. Claimant awarded $1,000. (Statutory maximum $2,500.)

¶1 This matter was held on January 31, 2000 in Billings, Montana. Petitioner, Raymond Ostermiller (claimant), was present and represented himself. Respondent, Employers Insurance of Wausau Mutual Company (Wausau) was represented by Mr. Kelly M. Wills.

¶2 Exhibits 1 and 2 were admitted without objection. Mr. Ostermiller and Patricia Hink were sworn and testified.

¶3 At the close of trial the Court entered a bench ruling awarding Mr. Ostermiller $1,000 for disfigurement and denying a penalty. The following findings of fact, conclusions of law and judgment confirm that ruling.

¶4 Having considered the testimony at trial, the exhibits, the demeanor of the witnesses, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶5 Claimant injured his cervical spine on May 22, 1996, while working for Ecolab, Incorporated. The injury occurred in the course and scope of his employment.

¶6 At the time of the injury, Ecolab was insured by Wausau. Wausau accepted liability for claimant's injury and has paid appropriate temporary total disability benefits, permanent partial disability benefits, and medical benefits.

¶7 As a result of his injury, claimant underwent an anterior cervical fusion. The surgery was performed by making a horizontal surgical incision on the front right side of claimant's neck, beginning near the Adam's apple (thyroid cartilage).

¶8 As far as surgical incisions are concerned, claimant's incision is well healed and blends relatively well with the skin and flesh of his neck. From a surgeon's point of view, the scar may be minimal and non-disfiguring. However, standing face to face with the claimant at ordinary conversational distance, the scar is noticeable. It is a large scar, transversing the

full front, right side of the neck. While there is no keloid or other unsightly growth surrounding the scar, it is nonetheless observable under ordinary lighting and is likely to cause persons speaking to claimant at a conversational distance to ask about it. In addition, claimant testified that the scar is sensitive to sunlight and becomes more prominent in the summer when his neck is exposed to stronger sunshine. He testified the scar then appears as a red streak against his neck. I found claimant credible on this point.

¶9 Giving consideration to the size of the scar, the fact that it may trigger questions from persons talking to claimant, but, on the other hand, the lack of unusual keloid or other scarring, I find that claimant is entitled to $1,000.

¶10 Wausau did not act unreasonably in failing to pay disfigurement benefits. The words "serious disfigurement", as used in the statute raise reasonable questions of interpretation. Further, the claimant's scar is not particularly prominent and from the surgeon's point of view is probably not deemed disfiguring. Moreover, Wausau made an offer to claimant and claimant's demand ($1,200) was greater than what has been awarded by the Court.

CONCLUSIONS OF LAW

¶11 Claimant's entitlement to benefits in this case is governed by the 1995 version of the Workers' Compensation Act since that was the law in effect at the time of his injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶12 Benefits for disfigurement are governed by section 39-71-708, MCA (1995), which provides:

> **39-71-708. Compensation for disfigurement.** (1) Injured workers who suffer serious face, head, or neck disfigurement may be entitled to benefits not to exceed $2,500, in addition to benefits payable under 39-71-703.
>
> (2) A payment under this section may not be in lieu of the separate benefit of medical and hospital services or of any benefits paid under 39-71-701 for temporary total disability.

The section limits benefits to serious disfigurement of the face, head, and neck. That limitation indicates legislative intent to compensate disfigurement which is apparent to others and which cannot be covered by clothing. It indicates an intention to compensate the claimant for associated embarrassment.

¶13 Wausau questions whether claimant's scar constitutes "serious disfigurement" within the meaning of the section. "Disfigurement" means "anything that disfigures." Webster's New World Dictionary & Thesaurus, Accent Software International Macmillan Publishers, Ver. 1.0 (1997). In turn, disfigure means "to hurt the appearance or attractiveness of, deform; deface; mar." Certainly, a noticeable scar the size and place of claimant's scar hurts and mars his appearance, thus it is disfiguring. The harder question is whether the

disfigurement is serious. As pertains to the present context, commentary in Webster's New World Dictionary & Thesaurus says that "**serious** implies . . . involvement in something really important as distinguished from something frivolous or merely amusing." *Id*. The various definitions of "serious" include "not trifling", "important", "weighty", and "giving cause for concern." *Id*.

¶14 Assessing whether a scar on the face, head, or neck constitutes "serious" disfigurement necessarily involves observation of the particular scar on the individual person. In this particular case, the length of the scar, as well as claimant's testimony that the scar becomes more prominent during summer, convinced me the scar constitutes serious disfigurement to claimant's neck. In reaching this conclusion, I considered whether someone talking to claimant at ordinary conversational distance would be likely to notice the scar and ask claimant about it. In the circumstances of this case, that test translates the statutory words into a practical standard. It encompasses not only whether the scar noticeably affects claimant's appearance but whether its appearance is sufficiently "serious" to trigger inquiry.

¶15 Section 39-71-708, MCA, does not provide a schedule of benefits. It provides only that benefits "not to exceed $2,500" may be awarded. In so providing, however, the section implicitly indicates that $2,500 is not an automatic award, only a maximum, and that the amount to be awarded should be determined on a case-by-case basis giving consideration to the severity of the disfigurement. In this case, the scar, while evident at conversational distance, is not evident further away, and is not of a nature or degree which would warrant the maximum award.

¶16 Clamant's request for a penalty is governed by section 39-71-2907, MCA, which provides for a 20% increase in benefits where the insurer has unreasonably delayed or refused benefits due the claimant. In this case, the insurer reasonably questioned claimant's entitlement to benefits. The fact that the Court has awarded benefits does not equate to unreasonableness.

¶17 Claimant is entitled to his costs, if any.

JUDGMENT

¶18 1. Pursuant to section 39-71-708, MCA (1995), the claimant, Raymond Ostermiller, is entitled to $1,000 for serious disfigurement, which shall be paid by respondent, Employers Insurance of Wausau Mutual Company.

¶19 2. The claimant is not entitled to a penalty.

¶20 3. Claimant is entitled to his costs, if any. If he claims costs, he shall submit a written memorandum of his costs within 10 days of this decision. ARM 24.5.342.

¶21 4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶22 5. Any party to this dispute may have 20 days in which to request a rehearing from these findings of fact, conclusions of law and judgment.

DATED in Helena, Montana, this 3rd day of March, 2000 .

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Raymond Ostermiller - Certified Mail (Rule 24.5.348)
Mr. Kelly M. Wills
Date Submitted: January 31, 2000