

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

HEATHER STEVENS,

Employee,

v.

SAM'S CLUB,

Employer.

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Hearing No. 1359671

SEP 26 2014

**DECISION ON PETITION TO DETERMINE DISFIGUREMENT**

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on September 10, 2014, in the Hearing Room of the Board, in Milford, Delaware.

**PRESENT:**

JOHN BRADY

PATRICIA MAULL

Heather Williams, Workers' Compensation Hearing Officer, for the Board

**APPEARANCES:**

Walt Schimittinger, Attorney for the Employee

Delia Clark, Attorney for the Employer

## **NATURE AND STAGE OF THE PROCEEDINGS**

Heather Stevens ("Claimant") was injured on September 30, 2010, while she was working for Sam's Club ("Employer"). She was burned while removing baked goods from an oven on Employer's premises. Claimant has received certain workers' compensation benefits, including compensation for 25% permanent impairment to the skin, 5% impairment to her upper left extremity, and 5% to her cervical spine. Her compensation rate is \$292.47 per week, based on a weekly wage at the time of the injury of \$438.70.

Claimant filed a Petition to Determine Disfigurement on January 8, 2014. A hearing was held on this petition on September 10, 2014. This is the Board's decision on the merits.

### **SUMMARY OF THE EVIDENCE**

Claimant testified that she is currently thirty (30) years old, but was twenty-six (26) at the time of the work injury on September 30, 2010. The work injury occurred when Claimant was pulling pies out of the oven and the oven rack tilted and fell on her. As a result of the accident, Claimant sustained burns on her face neck, chest, left arm, and back. She has had a number of surgeries because of her injuries, but has no plans for future surgeries. Claimant's scars from the injury have remained the same for several years now.

Claimant explained that she takes steps to avoid sun exposure now because the heat irritates the scars and her doctor told her to avoid too much sun exposure. She reported that she always tries to wear a jacket or shirt that covers her neck because everyone asks her what happened to her. It bothers her a great deal when people ask her about her injuries. Claimant's scars are noticeable to others and that upsets her.

Claimant displayed her scarring to the Board while wearing a two piece bathing suit. Claimant's counsel measured each of the distinct scars. Because of the large number and severe

nature of Claimant's scars, the Board listed and awarded each one separately. They are described as follows:

- 1) Toward the top of Claimant's left shoulder there is a scar with a raised portion in the center that is one and a half inches wide.
- 2) Claimant has scarring on her bicep that is almost "T" shaped and measures 5.5 inches top to bottom and wraps around the arm at its widest and is about 4 inches. The top portion of the scar is 2.75 inches and at the bottom it is about an inch.
- 3) On Claimant's inner arm there is a scar that is 4 inches wide and spans down the arm to the forearm.
- 4) Claimant has a scar from the elbow on the inside of the arm that is about 3.5 inches long.
- 5) On Claimant's back right shoulder there is a white de-pigmented area that is just over 7 inches in width and it is irregular and blotchy in appearance. There is a contiguous part that is 2.75 inches and another part around her neck that measures approximately 4.5 inches toward the shoulder from the neck. From the beginning of the neck down toward the chest the scar measures over 7 inches.
- 6) On Claimant's top right shoulder there is a light spot that is 1.25 inches by 1 inch.
- 7) Claimant has a lighter spot on her right shoulder that measures 4.75 inches by 2.75 inches.  
  
There is another spot that measures approximately half an inch with a scar that is raised and pink and is a part of the de-pigmented skin on the right shoulder.
- 8) On her right arm, Claimant has an additional spot of de-pigmented skin that measures 4.5 inches high and 2.75 inches wide.

- 9) On the underside of Claimant's mid right bicep there is another linear scar that measures 2 inches by 3/8 inches.
- 10) Inside Claimant's elbow there is another spot of de-pigmented skin that measures 1.5 inches by 1 inch.
- 11) On Claimant's right forearm there is an additional spot of de-pigmented skin that measures .5 inch by 3/8 inch.
- 12) On Claimant's arm, there is another small spot that is .25 inches by half inch.
- 13) On Claimant's chest, from the trapezius muscle down to her chest, there is a raised "ropey" area that is part of another scar, but is higher raised, that is 4.5 inches long and 2.25 wide and extends up the right side of her neck.
- 14) On Claimant's neck there is a scar that measures approximately 2 inches.
- 15) On the center of Claimant's chest, there is an area of pink and white grafted skin (with scarring) that overall measures over 3 inches wide and 2.5 inches long.
- 16) Claimant has a de-pigmented area that runs along the inside right of her bikini top, with de-pigmentation that measures 4.5 inches and a scar that is 1.5 inches long.
- 17) Claimant also had skin graft taken from her lower abdomen right above her bikini line on the abdomen that measures 10.5 inches wide (hip to hip) and is approximately .5 inches tall . The scar appears irregular with purple and white discoloration.
- 18) On Claimant's back right hip there is spot of discoloration that measures 3.5 inches long and 1.5 inches at its widest.
- 19) Closer to Claimant's belt line there is another scar that measures over 1.5 inches wide and 1.5 inches long, that is in the general shape of an "X."

20) On Claimant's face, the entire right side was burned and she had no skin left on her nose and cheek after the injury.

While the scars and marks were measured and listed separately, the extensive damage was quite noticeable and obvious as Claimant is fair skinned and the scars and marks are extensive. The scarring and marks nearly cover Claimant's neck, arms, upper chest, shoulders and portions of her back.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Disfigurement

The sole dispute in this matter is the extent and valuation of Claimant's disfigurement. The parties agree that this disfigurement does not warrant a *Bagley* calculation, but should be assessed on the 0-150 week scale. The Board may award "proper and equitable compensation for serious and permanent disfigurement to any part of the human body up to 150 weeks, provided that such disfigurement is visible and offensive when the body is clothed normally." DEL. CODE ANN. tit. 19, § 2326(f).

Each of these body parts is eligible for a separate disfigurement award, with each capable of being rated on the standard 0 to 150 scale. The factors that the Board should consider in determining the number of weeks of compensation are (a) the size, shape and location of the disfigurement, (b) the social and psychological impacts suffered by the claimant, (c) the comparative severity of the disfigurement and (d) other relevant matters. *Colonial Chevrolet, Inc. v. Conway*, Del. Super., C.A. No. 79A-FE-13, Longobardi, J., slip op. at 2 (April 28, 1980); see *Murtha v. Continental Opticians, Inc.*, Del. Supr., No. 395, 1997, Walsh, J. (January 16, 1998)(Order)(adopting the *Colonial Chevrolet* formulation). Evaluating the impact and severity of a disfigurement is inherently subjective and not amenable to measured calculation. *Roberts v.*

*Capano Homes, Inc.*, Del. Super., C.A. No. 99A-03-013, Del Pesco, J., 1999 WL 1222699 at \*3 (November 8, 1999).

The Board fully described the sizes, shapes and locations of Claimant's scarring in the "Summary of the Evidence," and it incorporates that description here. Claimant's scarring is extensive, aesthetically displeasing, and visible from a distance. Not only were was the scarring visible while Claimant was in a bathing suit, but it was also clearly visible when Claimant was dressed in a dress, and would be visible in almost any normal clothing Claimant would wear.

The extent of Claimant's scarring adds to its severity. There were at least twenty scars and marks, covering her neck, arms, back, chest and abdomen. The scars and marks varied in color and size, but many were significant large and severe. Several of the marks were different textures and colors which stood in stark contrast to Claimant's fair skin. The hearing was a full four years after Claimant's last surgery and the scarring remained abundantly obvious even to the most casual observer.

Throughout the course of the hearing, Claimant was visibly and genuinely uncomfortable, especially while counsel was measuring her scars. Claimant testified that people often question her injuries and this is upsetting to her. Because Claimant was only twenty-six when the injury occurred, she will have a lifetime of dealing with the trauma this injury has caused, as well as the questions and stares from people noticing the visible scars.

The Board awards as follows for the individual marks/scars. For organization purposes, it is easiest to discuss these individually as listed and numbered above in the "Summary of the Evidence" section.

- 1) For the scar toward the top of Claimant's left shoulder with a raised portion, the Board awards twenty-five ( 25) weeks.

- 2) For the bicep scarring, the Board awards twenty-five (25) weeks.
- 3) For the inner arm scar, the Board awards fifteen (15) weeks .
- 4) For the scar inside the arm, the Board awards six (6) weeks .
- 5) For the de-pigmented area on the back right shoulder, along with the contiguous part and scar from the neck to the chest, the Board awards five (5) weeks.
- 6) For the light spot on the top right shoulder, the Board awards two (2) weeks.
- 7) For the lighter spot on the right shoulder and the scar that is raised and pink and is a part of the de-pigmented skin on the right shoulder, the Board awards three ( 3) weeks.
- 8) For the spot of de-pigmented skin on the right arm, the Board awards three ( 3) weeks.
- 9) For the linear scar on the underside of the right bicep, the Board awards three ( 3) weeks.
- 10) For the spot of de-pigmented skin inside the elbow, the Board awards two (2) weeks.
- 11) For the spot of de-pigmented skin on the right forearm , the Board awards two ( 2) weeks.
- 12) For the smaller spot, the Board awards two (2) weeks.
- 13) For the raised “ropey” area and scar on the neck, the Board awards twenty ( 20) weeks .
- 14) For the small scar on the neck, the Board awards two (2) weeks.
- 15) For the area of pink and white grafted skin (with scarring that was large and highly visible) on the chest, the Board awards one hundred and twenty (120) weeks.

- 16) For the de-pigmented area that runs along the inside right of the bikini top area, the Board awards twelve (12) weeks.
- 17) For the lower abdomen scar, the Board awards twenty-five (25) weeks (combined for skin graft and scarring).
- 18) For the spot of discoloration on the back right hip, the Board awards three (3) weeks.
- 19) For the scar by the belt line, the Board awards two (2) weeks.
- 20) For the burns to the face (an area that is most visible and traumatizing when injured), the Board awards one hundred and fifty (150) weeks.

In summary, the Board grants a total disfigurement award of four hundred and twenty-seven (427) weeks of compensation. At Claimant's compensation rate at the time of injury, that equals an award of \$124,884.69.

#### **Attorney's Fee**

A claimant who is awarded compensation is generally entitled to payment of reasonable attorney's fees "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE Ann. Tit. 19 § 2320. At the current time, the maximum amount based on Delaware's average weekly wage calculates to \$9,983.50.

The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the Cox factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded. See *Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96-A-01-005,



Cooch, J., 1996 WL 527213 at \*6 (August 9, 1996). A “reasonable” fee does not generally mean a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant bears the burden of proof and must provide adequate information to make the required calculation. By operation of law, the amount of attorney’s fees awarded by the Board applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant’s counsel. DEL. CODE ANN. Tit. 19 § 2320(10)a<sup>1</sup>.

In this case, Claimant is entitled to an award 427 weeks for disfigurement. At Claimant’s compensation rate of \$292.47, the total award is \$124,884.69. Claimant’s counsel submitted an affidavit stating that he spent 5.3 hours in preparation time for this hearing, which itself lasted not quite an hour. Claimant’s counsel has a great deal of experience in workers’ compensation law, which is a specialized area of litigation. His firm’s initial contact with Claimant was in October 2010, so he has represented Claimant for nearly four years. This case was of average factual complexity and involved no unique or unusual legal issues. Counsel does not appear to have been subject to any unusual time limitations imposed by the circumstances of the case or Claimant, although he was unable to work on other matters simultaneously with this one. There is no evidence that counsel’s handling of this case prevented him from being able to accept other cases, other than from the Employer and the carrier. The fee arrangement between counsel and Claimant is a one-third contingency basis. Counsel does not expect a fee from any other sources and there is no evidence of Employer’s inability to pay counsel’s fee.

When considering the fees customarily charged in this area for such services as were rendered by Claimant’s counsel and the factors set forth above, the Board finds that a fee of

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<sup>1</sup>Attorney’s fees are not awarded if, thirty days prior to the hearing date, the employer gives a written settlement offer to the claimant that is “equal to or greater than the amount ultimately awarded by the Board.” DEL. CODE ANN. tit. 19, § 2320. A settlement offer was tendered by Employer, but it is for less than what was awarded. Accordingly, an award of attorney’s fees is appropriate in this case.

\$2,500.00 is reasonable in this case and is less than ten times the average weekly wage. This calculates to approximately \$400.00 per hour for counsel's services, which is not excessive, and is reasonable in this case.

#### STATEMENT OF THE DETERMINATION

For the reasons stated, the Board awards Claimant a total of four hundred and twenty-seven (427) weeks of compensation for Claimant's disfigurement related to her extensive burn injury. Claimant is also awarded an attorney's fee.

IT IS SO ORDERED THIS 24<sup>th</sup> DAY OF SEPTEMBER, 2014.

#### INDUSTRIAL ACCIDENT BOARD

  
JOHN BRADY

  
PATRICIA MAULL

I, Heather Williams, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

  
HEATHER WILLIAMS

Mailed Date:

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OWC Staff