

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

1310800

PAMELA BANNING,)
)
 Employee,)
)
 v.) Hearing No. 1310800
)
 UPS,)
)
 Employer.)

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 October 31, 2013, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

JOHN D. DANIELLO

OTTO R. MEDINILLA, SR.

Christopher F. Baum, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Walt F. Schmittinger, Attorney for the Employee

Andrew M. Lukashunas, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Pamela Banning ("Claimant") injured her right knee on September 21, 2007, while she was working for UPS ("Employer"). She eventually underwent a total knee replacement in April of 2009. Claimant developed an allergic reaction to the nickel in the knee replacement hardware as well as the bone cement used. A revision of the surgery was done in November of 2009 to use a different prosthesis that had a lower nickel content. It was not possible to have one that used no nickel. Claimant has continued with systemic nickel poisoning, which results in significant skin lesions.

Claimant has been compensated for a 71% permanent impairment to the right leg (177.5 weeks of compensation) and 20% permanent impairment to her skin (60 weeks of compensation) as a result of the work injury. Her compensation rate is \$351.82 per week, based on an average weekly wage at the time of injury of \$527.73 per week.

Claimant filed a Petition to Determine Disfigurement on July 2, 2013. A hearing was held on this petition on October 31, 2013. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified about her work injury and course of medical care, including the two right knee surgeries. She explained that her allergic reaction to the nickel started in her right lower extremity, but then the nickel poisoning became systemic and she also developed lesions on her left lower extremity as well.

Claimant explained that she cannot wear skirts or dresses because wearing pantyhose will cause abrasion on the lesions. Even when she wears pants, children can catch a glimpse of the lesions or welts from the nickel poisoning and comment on it. People are "grossed out" by her skin condition. The lesions that are on her legs now do not disappear. She has had some lesions

appear elsewhere on her body (such as her arm) but at this point those come and go. The leg lesions, though, have maintained the same appearance for over a year. If they are rubbed, it makes them worse and the skin breaks.

Claimant displayed her right leg to the Board. There is a surgical scar that runs from just above the right knee straight down. The length of the scar is roughly 6.75 to 7 inches and is about 3/8 of an inch at its widest. There is not much variation in width down the length of the scar. The scar is purplish in color and is depressed along its length.

With regard to the skin lesions, there are multiple welts or blotches from the knee on down to the ankle. These lesions are of irregular shapes and variable sizes. The largest area was on the calf and measured about 5.5 inches by 2.5 inches. Other markings were more dime-sized. Down by the ankle there was a larger mark measuring about 2.5 inches by .75 of an inch. There were at least fifteen distinct lesions on the leg. The lesions are discolored, being of a reddish-yellow mottled color. These were all darker than the surrounding skin.

Claimant also displayed her left lower extremity to the Board. There were fewer marks (about seven) on this leg. The largest is roughly in a Y-shape and roughly measures 4.5 inches by 5 inches. This mark is on the thigh. Above this mark is a smaller lesion measured at 1.5 inches by 3/4 of an inch. Below the Y-shaped mark, there are a couple dime-sized marks, one that is about half an inch in diameter and another about .75 of an inch in diameter. Lower in the leg there is a larger mark measured at 1 5/8 inches by 1 inch. These marks have the same red-yellow coloring and there are crusty white areas on the lesions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Disfigurement

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). 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 size, shape and location of Claimant’s disfigurements in the “Summary of the Evidence,” and it incorporates that description here. These various markings are significant and the Board finds it credible that they cause Claimant a substantial level of social and psychological discomfort. The markings on both legs would be easily visible from a distance. The disfigurement as a whole covers a large amount of the lower legs.

Rating the surgical scar itself, the Board notes that it is longer and wider than the average surgical scar, which is not surprising because it is the result of two knee surgeries. The discoloration makes it even more visible. It is an ugly scar, although it less severe a disfigurement than the nickel poisoning lesions elsewhere on the leg and considerably less severe

than an amputation. Weighing all these considerations, on the standard 0 to 150 scale, the Board would award ten weeks of compensation for the surgical scar alone.

The more significant disfigurement is the multiple lesions. In this regard, the markings on the right leg are more severe than the left leg, but even the marks on the left leg are more disfiguring than the surgical scar alone. Claimant's counsel argues that these marks are more comparable to burn scars than surgical scars, and the Board agrees. The irregular shapes, discoloration and multiple spots worsen the appearance of the disfigurement. The disfigurement caused by the nickel poisoning is ugly and far more significant than a simple surgical scar. It is not, however, as bad as an amputation. Weighing all these considerations, on a standard 0 to 150 scale, the Board awards 50 weeks of compensation for the disfigurement to the right lower extremity and 30 weeks for the disfigurement to the left lower extremity.

When a body part has suffered permanent impairment as well as disfigurement, the Board is required to (1) rate the number of weeks to be awarded on the standard 0 to 150 scale, then (2) calculate the number of weeks to be awarded on a scale between 0 and the number of weeks awarded for permanent impairment plus 20%, and then (3) give a disfigurement award of the higher of the two numbers of weeks. See *Bagley v. Phoenix Steel Corp.*, 369 A.2d 1081, 1083-84 (Del. 1977); *Murtha v. Continental Opticians, Inc.*, Del. Super., C.A. No. 96A-02-012, Alford, J. (August 27, 1996).

Claimant's counsel argues that, for purposes of this analysis, Claimant's permanency award to the right lower extremity and the award for permanency to the skin must be combined. The statute mandates this so-called *Bagley* analysis when "the nature of the injury causes both disfigurement to and loss or loss of use of the same part of the body." See DEL. CODE ANN. tit. 19, § 2326(f). Claimant argues that this wording is so broad that the award for loss of use of the

leg and for loss of use of the skin must be combined for purposes of determining the “loss of use of the same part of the body.” The Board reluctantly agrees. However, the Board points out that, unlike the skin impairment, the impairment to the right lower extremity is limited to that body part. With respect to the disfigurement of the left lower extremity, the only applicable impairment is the skin impairment.

Thus, with respect to the right lower extremity only, Claimant received a total of 237.5 weeks of compensation for permanent impairment (177.5 weeks for the leg plus 60 weeks for the skin).¹ Applying the *Bagley* formula results in the second scale for the right lower extremity being from 0 to 285 weeks (237.5 weeks of permanent impairment plus twenty percent, *i.e.*, 47.5 weeks). This is obviously larger than the usual 0 to 150 week scale. On the normal scale, the Board awarded ten weeks of compensation for the surgical scar. This is about 6 2/3% of the scale. The scar has not changed just because a different scale is being used. The Board would still award about 6 2/3% of scale on the larger 0 to 285 scale. Accordingly, under the larger *Bagley* scale, the Board would award 19 weeks of compensation for the surgical scar. With respect to the nickel poisoning lesions, on the normal scale the Board award 50 weeks of compensation, which is one-third of the scale. Again the disfigurement itself has not changed just because a larger scale is being applied, and the Board would still award about one-third of the scale for the disfigurement. Thus, on the larger 0 to 285 scale, the Board would award 95 weeks of compensation for the right leg lesions.

¹ Arguably the skin award of 60 weeks covers more than just the right leg—it is, in fact, an impairment to all of the skin. However, there is no rational way to apportion that award over different body parts. The skin is a body part in itself. In the same way, under more normal circumstances, while a scar might only be on a very small part of a leg, the impairment award for the entire leg is used in making the *Bagley* calculation. Thus, considering how the statute is currently written, the Board believes that the full 60 weeks for the skin impairment award must be included in the *Bagley* calculation for both the right leg and the left leg.

Accordingly, for the right lower extremity, the award on the larger *Bagley* scale is greater than that awarded under the normal 0 to 150 scale. By law, therefore, Claimant is awarded the higher amount, namely 19 weeks for the surgical scar and 95 weeks for the nickel poisoning lesions. Thus, the total disfigurement award for the right lower extremity is 114 weeks.

With respect to the left lower extremity only, Claimant received a total of 60 weeks of compensation for permanent impairment to the skin. Applying the *Bagley* formula results in the second scale for the left lower extremity being from 0 to 72 weeks (60 weeks of permanent impairment plus twenty percent, *i.e.*, 12 weeks). This is obviously much smaller than the usual 0 to 150 week scale. Under the normal scale, the Board awarded 30 weeks of compensation for the left leg disfigurement, which is 20% of the scale. Again, the nature of the disfigurement does not change just because a different scale is used. The Board would still award about 20% of scale on the smaller *Bagley* scale applicable to the left leg, or about 14.4 weeks of compensation. Obviously, the award on the normal scale is larger so that is what is awarded, namely 30 weeks of compensation.

Attorney's Fee

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "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 based on Delaware's average weekly wage calculates to \$9,911.90.

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. In this case, Employer did

make a written settlement offer more than thirty days prior to the hearing and that offer was for less than the Board's award. Accordingly, an award of attorney's fees is appropriate.

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). The Board is permitted to award less than the maximum fee and consideration of the *Cox* factors does not prevent the Board from granting 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. 96A-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, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. By operation of law, the amount of attorney's fees awarded applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant's attorney. DEL. CODE ANN. tit. 19, § 2320(10)a.

Claimant has received an award of a total of 144 weeks of compensation. At Claimant's compensation rate, that equates to a total award of \$50,662.08 for Claimant's disfigurement related to the work accident. Claimant's counsel submitted an affidavit stating that 6.3 hours were spent preparing for the hearing. The hearing itself lasted about thirty minutes. Both the preparation time and the hearing time are longer than usual for a disfigurement claim because Claimant's disfigurement itself is unusual. Claimant's counsel was admitted to the Delaware Bar in 1995 and he is experienced in workers' compensation litigation. Counsel or his firm's initial contact with Claimant was in January of 2012, so the period of representation has been for well in excess of a year and a half. Like most disfigurement hearings, this case was factually basic

involving little more than asking a few simple questions of Claimant and displaying the disfigurement to the Board. It did involve a unique (but minor) issue of law concerning the application of the *Bagley* analysis. It required average skill to present the case properly. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, although naturally he could not work on other matters at the same time as he was working on this one. There is no evidence that counsel was actually precluded from accepting other employment because of his representation of Claimant, although naturally he would not have been able to represent the employer or insurance carrier if any such offer of employment had been made. Counsel's fee arrangement with Claimant is on a one-third contingency basis. Counsel does not expect to receive compensation from any other source with respect to this particular litigation. There is no evidence that the employer lacks the financial ability to pay an attorney's fee.


Taking into consideration the fees customarily charged in this locality for a disfigurement claim, the services that were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of \$2,500 is proper and reasonable in this case and does not exceed thirty percent of the value of the award. The fee calculates out to being well in excess of \$350.00 per hour for counsel's services, which is more than adequate for a disfigurement claim.

STATEMENT OF THE DETERMINATION

For the reasons stated, the Board awards Claimant a total of 114 weeks of compensation for disfigurement to the right lower extremity and 30 weeks of compensation for disfigurement to the left lower extremity. Claimant is also awarded an attorney's fee.

IT IS SO ORDERED THIS 14th DAY OF NOVEMBER, 2013.

INDUSTRIAL ACCIDENT BOARD

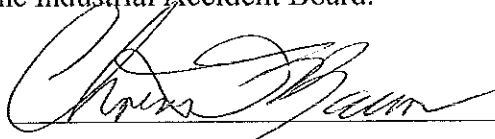


JOHN D. DANIELLO

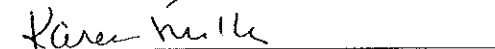


OTTO R. MEDINILLA, SR.

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



Mailed Date: 11-14-13



OWC Staff