

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

SONIA BECK,)
)
 Employee,)
)
 v.)
)
 BRAFMAN FAMILY DENTISTRY,)
)
 Employer.)

Hearing No. 1233899

*Claimant received
total 300 wks defgmt
for knee below
knee amputation*

**DECISION ON PETITION FOR
DISFIGUREMENT BENEFITS**

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 July 9, 2008, in the Hearing Room of the Board, in Milford, Delaware. An extension of time for issuance of the decision was taken pursuant to 19 Del. C. § 2348(k).

PRESENT:

VICTOR R. EPOLITO, JR.

MARY DANTZLER

Julie G. Bucklin, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Andrea G. Green, Attorney for the Employee
Christian Heesters, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On December 4, 2007, Sonia Beck ("Claimant") filed a Petition for Disfigurement Benefits for the partial amputation of her right leg related to her May 27, 2003 industrial injury. Prior to the amputation, Claimant was awarded 112.5 weeks of disfigurement benefits, as well as 187.5 weeks of permanent impairment benefits for a seventy-five percent permanent impairment rating. After the amputation, the parties reached an agreement for the additional 62.5 weeks of permanent impairment benefits for a total of 250 weeks for one hundred percent permanent impairment to the right leg.

Claimant is seeking an award of 187.5 weeks of disfigurement benefits, which would amount to a total of 300 weeks for disfigurement benefits in accordance with the *Bagley* analysis. *Bagley v. Phoenix Steel Corp.*, 369 A.2d 1081, 1083-84 (Del. 1977) ("*Bagley*"); see also *Murtha v. Continental Opticians, Inc.*, Del. Super. Ct., C.A. No. 96A-02-015, Alford, J. (August 26, 1997). Brafman Family Dentistry ("Brafman") argues that the disfigurement award should not be for a total of three hundred weeks, as Claimant seeks. Brafman argues that Claimant should be limited to a total of 150 weeks of disfigurement benefits based on *Del. Code Ann. tit. 19, §2326*. On July 9, 2008, the Board conducted a hearing on Claimant's petition and this is the Board's decision on the merits.¹

SUMMARY OF THE EVIDENCE

Claimant, fifty-three years old, testified about her industrial injury and current condition. Claimant injured her right leg at work at Brafman on May 27, 2003. She sought treatment for

¹ Normally, decisions are to be issued within fourteen days of a hearing. See 19 *Del. C.* § 2348(k). Because of workload demands and other time restraints, it was necessary to take an extension of time to issue this decision in accordance with 19 *Del. C.* § 2348(k).

the right leg, but ultimately had the leg amputated below the knee. The amputation is obviously visible to the public.

The amputation has an impact on Claimant's activities of daily living, such as showering and shopping. When Claimant is in public, children stare, point and comment on her amputated leg. Sometimes adults stare, point and comment on it also. Recently, Claimant's grandson was with Claimant at the store and a family started talking about Claimant's amputation amongst themselves and her grandson got very upset about it. It does not feel good to hear people talking about her and the amputated leg. Claimant underwent counseling when she was in rehabilitation after the amputation.

When Claimant has to shop for clothes, she does not like it now. She does not go out often like she did before the amputation. She does not go to the beach anymore, because it is difficult to get through the sand and she does not like to wear a bathing suit any longer. She usually wears pants now to hide the amputation. Claimant uses a cane to walk, but uses a wheelchair at the store and at home because it is easier. Claimant has to go out shopping, so she does go out in public when necessary.

Claimant has not been able to get a prosthetic leg because she has too much swelling in the remainder of the leg and she cannot fit it into the "shrinker" to put on the prosthesis. She is in the process of exploring another prosthesis. Claimant takes medication daily, but did not take it on the day of the hearing, because it "dulls" her and she wanted to be alert for the hearing.

Claimant showed her leg and the stump to the Board. Her leg was amputated below the knee. There is still significant swelling of the stump and there is a scar around the end of the stump.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant is seeking an award of 187.5 weeks of disfigurement benefits, which would amount to a total of 300 weeks for disfigurement benefits in accordance with the *Bagley* analysis. *Id.* Brafman argues that Claimant should be limited to a total of 150 weeks of disfigurement benefits based on *Del. Code Ann. tit. 19, § 2326*.

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)*. It is undisputed that Claimant's disfigurement is related to the industrial accident and is permanent in nature. The Board finds the disfigurement to be visible and offensive when normally clothed. Therefore, Claimant is entitled to disfigurement benefits.

Factors that are considered 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. Ct., C.A. No. 79A-FE-13, Longobardi, J., slip op. at 2 (April 28, 1980) (“*Conway*”).

The Board finds that the disfigurement of Claimant’s right leg is extremely noticeable, as the leg was amputated below the knee and the remaining part of the leg is extremely swollen. The Board accepts Claimant's testimony that she gets upset when she hears people talking about her amputation. She has to change the way she walks, dresses and performs her activities because of the amputation. Considering all the factors delineated in *Conway*, Claimant is awarded a total of one hundred fifty weeks of compensation for the disfigurement of her right leg.

Pursuant to *Del. Code Ann.* tit. 19, § 2326(f), the maximum payable compensation may increase when the disfigurement is related to a permanent impairment to the same part of the body. If the compensation awarded for permanent impairment, plus twenty-percent thereof, exceeds one hundred and fifty weeks, then the permanent impairment amount plus twenty-percent is used as the top end of the scale for determining disfigurement. *Bagley, supra; Murtha supra.*

Claimant has been awarded two hundred fifty weeks of compensation for one hundred percent permanent impairment to her right leg. Claimant is entitled to an award pursuant to *Del. Code Ann.* tit. 19, § 2326(f). Claimant gets the larger of the two amounts computed according to the zero to one hundred fifty-week disfigurement scale, as compared to the 120% impairment scale. Based on the 120% impairment scale, Claimant would be entitled to three hundred weeks of compensation for the disfigurement of her right leg. Since such amount is larger than the disfigurement scale, the Board chooses to apply the greater award of three hundred weeks of benefits arrived under the impairment scale. For Claimant's right leg, the appropriate scale in the instant case is the impairment scale, as it yields the greater award. *Bagley, supra.*

In support of her argument, Claimant cites *Williams v. Canyon Construction*, Del. Super., C.A. No. 02A-07-003, Bradley, J. (March 5, 2003) ("*Williams*"). In *Williams*, the Board awarded Mr. Williams a total of 300 weeks of disfigurement benefits for each leg after his legs were amputated and the Superior Court affirmed that decision. The Court held that the Board is required to award the higher of the two computations set forth in *Del. Code Ann.* tit. 19, §2326(f). Under the disfigurement calculation, Mr. Williams was entitled to 150 weeks of benefits, but under the second calculation, Mr. Williams was entitled to 300 weeks of benefits due to the one hundred percent permanent impairment award that resulted from the amputation.

The Court also held that the Board was within its discretion to award 300 weeks per leg for the disfigurement due to the amputations and that the employer was entitled to a credit for the amount previously paid, since Mr. Williams was awarded some disfigurement benefits prior to the amputation. The Board finds that *Williams* is directly on point with the case at hand. In both cases, the claimant injured his or her leg in an industrial accident and was awarded disfigurement benefits, then had the leg amputated at a later date as the result of medical complications from the injury, and was then entitled to a total of 300 weeks of disfigurement benefits due to the amputation and the calculation based on the impairment scale set forth in § 2326(f).

Based on the foregoing, Claimant is awarded a total of \$60,804.00 for three hundred weeks of compensation for the disfigurement of her right leg at her compensation rate of \$202.68 per week. Since Claimant has already been paid for 112.5 weeks of disfigurement benefits for the disfigurement of the right leg prior to the amputation, Claimant is now entitled to payment of the remaining 187.5 weeks of benefits, which amounts to \$38,002.50.

Attorney's Fee

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against Brafman in an amount not to exceed thirty percent of the award or ten times the average weekly wage, whichever is smaller. *Del. Code Ann.* tit. 19, § 2320. However, when the employer submits a settlement offer to Claimant or Claimant's counsel at least thirty days before the hearing that is equal to or greater than the Board's award, the Claimant is no longer entitled to receive an award of attorneys' fees. *Id.* At the conclusion of the hearing, Brafman submitted a settlement offer that was sent to Claimant's counsel on April 28, 2008, which was thirty days before this case was originally scheduled to be heard on May 28, 2008. The case was continued due to a conflict of interest with a Board Member scheduled for May 28, 2008, which is why the

case was not heard until July 9, 2008. The settlement offer that was sent to Claimant on June 5, 2008, after the continuance due to the conflict, was untimely since the only reason the case did not go forward on May 28, 2008 was due to that conflict with the Board Member. In any event, both settlement offers were for less than the award; therefore, Claimant is entitled to an attorney's fee award in this case.

Claimant's counsel submitted an affidavit attesting to six hours of preparation for this one hour hearing. This case was not novel or difficult, nor did it require exceptional legal skills to try properly. It was not argued that acceptance of this case precluded other employment by Claimant's counsel. The Board considered the fees customarily charged in this locality for similar legal services, the amounts involved and the results obtained. The Board also considered the argument that this case posed time limitations upon Claimant's counsel, the date of initial contact on June 23, 2003, and the relative experience, reputation, and ability of Claimant's counsel. It was argued that the fee was contingent, that Claimant's counsel does not expect to receive compensation from any other source, and that the employer is able to pay an award. *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

The Board must consider the ten factors enumerated in *Cox* when considering an attorney's fee award or else the Board would be abusing its discretion. *Thomason v. Temp Control*, Del. Super. Ct., C.A. No. 01A-07-009, Witham, J., slip.op. at 5-7 (May 30, 2002). Claimant bears the burden of establishing entitlement to an attorney's fee award and must address the *Cox* factors in the application for an attorney's fee. Failure to address the *Cox* factors deprives the Board of the facts needed to properly assess the claim. The *Cox* factors were addressed in the Affidavit Regarding Attorney's Fees.

In the case at hand, based on the results obtained and information presented and Brafman's failure to argue that Claimant is not entitled to an attorney's fee, the Board finds that one attorney's fee in the amount of \$2,200.00 is reasonable. *Del. Code Ann.* tit. 19, § 2320. The Board finds that the attorney's fee awarded is reasonable given Claimant's counsel's level of experience and the nature of the legal task. In accordance with § 2320(10)a, the attorney's fee awarded shall act as an offset against fees that would otherwise be charged by counsel to Claimant under their fee agreement.

STATEMENT OF THE DETERMINATION

Based on the foregoing reasons, the Board GRANTS Claimant's Petition for Disfigurement Benefits for the right leg. Claimant is awarded \$38,002.50 for the remaining 187.5 weeks of benefits for the disfigurement/amputation of her right leg. Claimant is also entitled to payment an attorney's fee in the amount of \$2,200.00.

IT IS SO ORDERED THIS 30th DAY OF JULY 2008.

INDUSTRIAL ACCIDENT BOARD

/s/ Victor R. Epolito, Jr.

/s/ Mary Dantzler

I hereby certify that the above is a true and correct decision of the Industrial Accident Board.

Julie G. Bucklin
Julie G. Bucklin
Workers' Compensation Hearing Officer

Mailed Date:

7-30-08

Rashanda Kennedy
OWC Staff