

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

CHARLES WALLS, )  
)  
Employee, )  
)  
v. )  
)  
DAVID G. HORSEY & SONS, INC., )  
)  
Employer. )

Hearing No. 1289219

**DECISION ON PETITIONS TO  
DETERMINE ADDITIONAL COMPENSATION DUE  
AND 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 April 29, 2009, 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:**

LOWELL L. GROUNDLAND

ELAINE BOWEN

Julie G. Bucklin, Workers' Compensation Hearing Officer

**APPEARANCES:**

Andrea G. Green, Attorney for the Employee  
Kimberly Harrison, Attorney for the Employer

*Team:  
Board chooses  
6th Ed of the Guide &  
Dr. Piccione rating  
of 19% Lumber  
for a success-  
ful  
outcome  
b/c 5th Ed  
rating of 37%  
is too high*

## NATURE AND STAGE OF THE PROCEEDINGS

On November 6, 2008, Charles Walls ("Claimant") filed a Petition to Determine Additional Compensation Due. Claimant alleges that he has thirty-five percent permanent impairment to the lumbar spine due to a compensable industrial accident that occurred on June 21, 2006 while working for David G. Horsey & Sons, Inc. ("Horsey"). Horsey argues that Claimant has nineteen percent permanent impairment to the lumbar spine related to his industrial accident. On March 3, 2009, Claimant filed a Petition for Disfigurement Benefits for the surgical scar on his abdomen. On April 29, 2009, the Board conducted a hearing on both of Claimant's petitions. This is the decision on the merits of the case.<sup>1</sup>

## SUMMARY OF THE EVIDENCE

Claimant, thirty-six years old, testified about his industrial injury at Horsey and medical condition. Claimant has a ninth grade education and his work experience has been in heavy labor. He did concrete finishing work and heavy lifting at Horsey. Claimant earned \$739.65 per week at Horsey and has a compensation rate of \$493.35 per week.

On June 21, 2006, Claimant was injured when he was lifting manhole covers, loading them on a truck and placing them in three locations. Each manhole cover weighed approximately two hundred pounds. Claimant worked by himself most of the time and his coworkers called him the "one-man crew" because he did the work of two or three men by himself. Claimant picked up one of the manhole covers from the ground to put on the tailgate of the truck and he turned and felt a pop and pain in the low back and he dropped down to the knees.

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<sup>1</sup> 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).

Claimant had conservative treatment for about a year and then had surgery. He has had physical therapy, injections and went through a work-hardening program. He takes Percocet now for his pain and uses a TENS unit about three to four times a week. He also wears a back brace most of the time. His pain level most of the day is a three to four out of ten on the pain scale when he takes the medication. The pain is worse with lifting and when the weather is cold and damp.

Claimant returned to work at Horsey after surgery and was excited to return to work. He changed jobs at Horsey to be on a wall crew to put up basement walls. The work was not bad at first, but he has difficulty doing the job because it is still heavy duty work. Claimant was told that he was being laid off from Horsey in February 2009 because work was slowing down, but Claimant believes that he was actually laid off because of his industrial injury. When he returned to work after surgery, Claimant could not work to the same level as he did before the surgery because it was too painful.

Claimant is now doing HVAC work in a commercial setting for a different employer and there are different physical demands than at Horsey. He does duct work, lifting pieces onto a duct jack. The lifting is a lot lighter than the concrete work and there are a lot more coworkers to help with lifting than at Horsey. Claimant is always above ground and the installation is in new construction.

Claimant lives with his wife and two children, ages seven and two, on a few acres of land in Laurel. Claimant took care of the home and land before the industrial accident. He built a pool and an apartment over the garage. Now, Claimant cannot keep up with the property because he is tired and sore when he gets home from work, so his wife helps him now. He does his own lawn work with his wife's help and a lot of breaks. Claimant is able to take care of his

own self-grooming activities. He cannot bend over like he did before the accident. He has difficulty taking off his work boots and needs his wife to help him.

Claimant used to help clean, cook, wash laundry and help with the children, but now he cannot help as much. He cannot pick up his seven-year-old son since the accident. Claimant used to go to the beach and go boogie boarding and skim boarding and he used to go four-wheeling and drag strip racing. Now, he has to watch those activities. He rides the four-wheeler a little bit, but not over rough ground. Claimant's son plays soccer and does karate, but Claimant cannot play those sports with him. Claimant wanted to be an assistant soccer coach, but he could not do it after he got injured; he is only able to watch the games. He kicks the ball with his son, but cannot run with his son. Claimant can drive for about an hour before he needs a break; he gets pain in the low back when he drives long distances.

About two months before the hearing, Claimant's pain level got intense and he used more Percocet, TENS unit and ice. The pain level was a seven to eight out of ten. The increased pain lasted for about ten days. He went to see the chiropractor and his wife called Dr. Bruce Rudin, who suggested another injection. Claimant waited to get the injection, because he did not want another one and the intense pain went away.

Claimant's wife prepared a list of Claimant's doctor's visits and the mileage. He went a total of 5,040 miles for those appointments.

Claimant has a scar from the surgery. The scar is visible to the public when he has his shirt off and is outside. People want to know what happened to him when they see the scar. Claimant feels bad when he has to explain it sometimes, depending on who it is. The scar is vertical and is located to the left and slightly below the belly button. It is red in color and is four inches long and about a half an inch wide at the widest part.

Stephen J. Rodgers, M.D., board certified in occupational medicine, testified on behalf of Claimant. Dr. Rodgers evaluated Claimant on September 4, 2008 and reviewed Claimant's medical records in conjunction with the examination. Dr. Rodgers believes that Claimant has thirty-five percent permanent impairment to the lumbar spine.

The medical records indicate that Claimant sustained a multilevel disc injury based on the June 30, 2006 MRI. Dr. Ganesh Balu diagnosed Claimant with low back pain with radiculopathy and the September 2006 EMG confirmed the right S1 radiculopathy. Dr. Ali Kalamchi diagnosed Claimant with discogenic back pain and Dr. Rudin performed a single-level fusion at L5-S1 on June 5, 2007. Claimant's history of the industrial accident is consistent with the medical records and treatment, which has been reasonable, necessary and causally related.

The physical examination showed that Claimant had increased muscle tone in the low back, decreased range of motion in the low back as measured by dual inclinometers, a hyperactive right Achilles reflex which indicates pressure higher up on the nerve, a positive sitting root test, and decreased strength on the right.

Dr. Rodgers relied upon the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition ("*Guides*") to evaluate Claimant for permanent impairment and believes that Claimant has thirty-five percent permanent impairment to the lumbar spine related to the industrial accident. Dr. Rodgers used the diagnosis related estimates ("DRE") method of assessment for rating Claimant's permanent impairment because he had a single level fusion. Claimant falls into DRE Category V for a single level fusion, which gives a permanent impairment rating between thirty-three and thirty-seven percent to the low back. In order to qualify for Category V, Claimant must meet the requirements of Categories III and IV, which include a single level fusion, abnormal reflexes, abnormal studies with radiculopathy, and

credible weakness compatible with injury; Claimant meets all of those requirements. Dr. Rodgers placed Claimant in the middle of the range at thirty-five percent because his recovery has been average with this surgery. Claimant's testimony regarding his activities and abilities reinforces his opinion regarding the thirty-five percent rating.

Example 15-6 in the *Guides* on page 387 is comparable to Claimant's condition. The mechanism of injury, symptoms and surgery are similar to Claimant with the persistent back and leg symptoms. The solid fusion and examination findings are also similar to Claimant. In the example, the patient was rated with thirty-seven percent impairment to the low back.

Dr. Rodgers' disagrees with Dr. Lawrence Piccioni's opinion that Claimant needs significant lower extremity impairments in order to qualify for DRE Category V. Dr. Rodgers explained that Claimant has radiculopathy and abnormal reflexes, which indicates that there is pressure higher up on the sciatic nerve.

Dr. Rodgers reviewed Dr. Piccioni's defense medical examination report. Dr. Piccioni opined that Claimant has nineteen percent permanent impairment to the lumbar spine when utilizing the sixth edition of the *Guides*. Dr. Rodgers is familiar with the fifth and sixth editions of the *Guides*. Dr. Rodgers believes that Dr. Piccioni did not apply the sixth edition of the *Guides* properly. He agreed that Claimant falls into Class 2, but Dr. Piccioni did not do the calculations correctly for movement from the default level within Class 2. When Dr. Rodgers applied the sixth edition of the *Guides* to this case, Claimant has a rating of seventeen percent permanent impairment to the lumbar spine.

Dr. Rodgers believes that the fifth edition is appropriate for rating this type of an injury because the fifth edition is still pretty much the standard and has not yet been formally supplanted by the sixth edition. With musculoskeletal injuries, the fifth edition is better for

imposing ratings than the sixth edition. The sixth edition tends to have ratings that are about half of the ratings from the fifth edition for similar conditions. The fifth edition is consistent with prior editions, but the sixth edition is very different and there has been no change in medical knowledge or improvements in medical care to account for the lower ratings in the sixth edition. The musculoskeletal section of the sixth edition is more diagnosis based and there is a glaring difference in the much lower ratings for the musculoskeletal section. Dr. Piccioni picked the correct class for Claimant in the sixth edition and Dr. Rodgers picked the correct category for Claimant in the fifth edition.

Dr. Rodgers agreed that someone with a terrible result from a single-level fusion would get the highest rating under the fifth edition of the *Guides*, which would be thirty-seven percent impairment to the lumbar spine. He added that the patient could get a rating up to forty-one percent when also applying the pain chapter. Dr. Rodgers also agreed that Claimant had a pretty good result with some remaining symptoms and is rated at thirty-five percent impairment.

Lawrence Piccioni, M.D., a board-certified orthopedic surgeon, testified by deposition on behalf of Horsey. Dr. Piccioni examined Claimant on December 12, 2007 and April 1, 2009 and reviewed medical records in conjunction with those examinations. Dr. Piccioni believes that Claimant has nineteen percent permanent impairment to the lumbar spine related to the industrial accident at Horsey.

Claimant told Dr. Piccioni about his industrial accident, medical treatment and current symptoms. Claimant reported that Dr. Rudin had taken x-rays in November 2008 and was happy with the way the surgery had gone, the way the hardware was there, and the way the fusion looked. Claimant was working for a new company doing HVAC duct work after being laid off from Horsey. Dr. Rudin had actually released Claimant to work without restrictions. Dr.

Piccioni agreed that Claimant's treatment had been reasonable, necessary and related to the industrial accident.

Claimant reported that the surgery helped quite a bit, but he was still having some back pain and right leg pain. Dr. Rudin was a little concerned about it and the last set of x-rays showed a spur of the right side near the fusion area and sometimes giving some of the back and leg pain, but he was not planning any other surgery or additional studies at that point.

Claimant was still seeing Dr. Lyndon Cagampam every two months for pain management and still had Claimant on three Percocet pills a day, a home TENS unit, and a lumbar support brace. Claimant was doing a home exercise program, but no formal physical therapy or chiropractic treatment.

Claimant also reported to Dr. Piccioni that he does not really self-restrict his activities at home. He takes care of his own lawn. He recently had to hire someone to do some plumbing work in his own home because he thought that it was a little bit too heavy to do himself. Most of the other things around the house he did on his own.

The physical examination showed that Claimant walked without a limp or use of a cane. He was able to sit comfortably for about twenty minutes during the interview portion of the examination. Claimant was able to mount and dismount the examination table on his own. He did not show an exaggerated behavior. He might have had a little stiffness in the back, particularly when he finished the part from lying down to a seated position, but otherwise was fairly mobile. Claimant had some tenderness over the L4-5 area on the right, but none on the left. He had no significant sciatic notch tenderness on either side. Claimant had some pain into the L5 dermatome, more so on the lateral side towards the knee, but he stated that it did not go towards the top of the foot. Dr. Piccioni did not note any spasm of the lumbar spine. Claimant

was a little stiffer in April 2009 than in December 2007, as he could only reach to about eight inches from his toes with forward flexion, although he did not allow Claimant to do any warm up. The flexion extension was slightly painful and mild rotation was a little tight, but not painful. The sciatic tension signs produced some very mild back pain, but no true sciatic symptoms down the leg. There was no atrophy of the thigh or calf. Claimant had tight hamstrings on the left. He could stand on his toes, toe/heel walk in tandem, and his deep tendon reflexes and sensory motor examination were grossly intact.

Dr. Piccioni thought that the examination findings were pretty consistent with the records and information that Claimant had provided. The physical findings on examination were all causally related to the industrial accident. Claimant was able to continue working in the same capacity.

Dr. Piccioni rated Claimant's permanent impairment with the sixth edition of the *Guides*. The sixth edition is much improved over the fifth edition and it is much easier to put people into the functional rating with the sixth edition. The sixth edition is more diagnosis-based and it is also functionally-based, which really helps with the lumbar spine in particular. Dr. Piccioni thinks and hopes that the sixth edition will help physicians to come up with relatively the same numbers.

Dr. Piccioni found that Claimant has nineteen percent permanent impairment to the lumbar spine that is causally related to the industrial accident. Claimant falls into Class 2 in Table 17-4 for a single level fusion with associated radiculopathy, with a ten to fourteen percent whole person rating. Dr. Piccioni placed Claimant at the high end of the range at fourteen percent because he still has persistent radicular symptoms in the L5 dermatome and he is still taking narcotic medication for the pain. The fourteen percent whole person impairment converts

to nineteen percent impairment for the lumbar spine, which Dr. Piccioni believes is an accurate reflection of Claimant's true functional capabilities.

Dr. Piccioni reviewed Dr. Rodgers' report. Dr. Rodgers indicated that Claimant was having significant symptoms, which is inconsistent with what Claimant reported to Dr. Piccioni. Claimant was still working for Horsey at the time of Dr. Rodgers' examination, but had gotten a new job with a new employer by the time of Dr. Piccioni's examination. The examination findings were different from Dr. Piccioni's findings in that Dr. Rodgers noted decreased strength, but Dr. Piccioni found no decreased strength and no atrophy. Since there was no atrophy, that is a good objective indication that Claimant is using his legs and there was no significant nerve injury down the leg causing motor weakness or muscle weakening. Dr. Piccioni would not describe Claimant as having anything close to significant lower extremity impairment.

Dr. Piccioni is aware that Dr. Rodgers utilized the fifth edition of the *Guides* and placed Claimant in DRE Category V with a thirty-five percent permanent impairment to the lumbar spine. Dr. Piccioni does not agree with that rating as being a reasonable assessment of Claimant's physical capabilities and functioning in his daily life; that is one of the main reasons why Dr. Piccioni believes that the sixth edition of the *Guides* should be utilized. In order to get to that impairment level with the sixth edition, the patient would need to have another level of disc impairment, another level of fusion, and other factors involved. Claimant had a functional capacity evaluation five months after surgery and was already deemed to be able to work in a medium duty capacity and that evaluation was conducted even before Claimant participated in a work-hardening program.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Permanent Impairment

Claimant bears the burden of proving by a preponderance of the evidence that he has thirty-five percent permanent impairment to the lumbar spine causally related to the industrial accident. Horsey argues that Claimant has nineteen percent permanent impairment to the lumbar spine related to the industrial accident. Based on the following, the Board finds that Claimant has nineteen percent permanent impairment to the lumbar spine.

When there is a conflict in medical testimony, the Board must resolve the conflict and decide which physician is more credible. *General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964). As long as there is substantial evidence to support its decision, the Board may accept the testimony of one physician over another. *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993). The physicians disagree on which edition of the *Guides* is more appropriate for evaluating Claimant's permanent impairment.

After studying all of the testimony, the Board accepts Dr. Piccioni's opinions over the opinions of Dr. Rodgers as to the permanent impairment of Claimant's lumbar spine and the application of the sixth edition of the *Guides*. Given Claimant's condition and level of functioning, the Board finds that the nineteen percent rating is more reasonable under the circumstances of this case than a thirty-five percent rating. Dr. Piccioni explained that Claimant is very functional and had a good result from surgery. Claimant had a functional capacity evaluation five months after surgery and was already deemed to be able to work in a medium duty capacity and that evaluation was conducted even before Claimant participated in a work-hardening program. Dr. Piccioni thought that the examination findings were pretty consistent with the records and information that Claimant had provided. The Board finds that the nineteen

percent rating is consistent with Claimant's functional levels, as he is able to work full-time in a physically demanding job and able to take care of his yard and home with his wife's help, and even ride his four-wheeler a bit and kick the soccer ball with his son. The Board recognizes that this level of functioning is not the same as it was before Claimant's industrial accident, which is why he is entitled to permanent impairment benefits; however, Claimant had a successful surgery that relieved a lot of his symptoms and luckily returned him to a relatively high level of functioning.

The Board finds that a thirty-five percent rating is too high for Claimant, considering his level of functioning and considering that Dr. Rodgers testified that a patient with a terrible outcome from surgery that cannot work or do any physical activities would get a thirty-seven percent permanent impairment rating under the fifth edition of the *Guides* and that with the pain chapter could get up to forty-one percent. Claimant is in much better condition than a person with such a terrible result, so a rating of thirty-five percent is too high for him considering the good result from surgery and his level of functioning and his ability to work full-time in a physically demanding job, take care of his home and yard, and participate in physical activities with his family.

Permanent impairment to the lumbar spine is an unscheduled loss and, therefore, the maximum recovery is three hundred weeks of compensation. *Del. Code Ann.* tit. 19, §2326(a). Therefore, the Board awards Claimant \$28,120.95 for fifty-seven weeks (nineteen percent of three hundred weeks) of benefits at his compensation rate (\$493.35 per week) for the permanent impairment of the lumbar spine.

Based on the foregoing, Claimant's Petition to Determine Additional Compensation Due is granted. Claimant is entitled to payment of \$28,120.95 for nineteen percent permanent impairment to the lumbar spine.

### **Mileage**

Claimant seeks payment for 5,040 miles of travel for medical treatment. Claimant presented a travel log with the names of the medical providers and the dates of service. The total mileage came to 5,040 miles. Horsey had no comment about the mileage issue. The Board finds that Claimant is entitled to payment for these travel expenses.

### **Disfigurement Benefits**

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 scar is related to the industrial accident and is permanent in nature. The Board finds the scar 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 surgical scar on Claimant's abdomen is visible, but not as visible as a scar located on the face or hands. The scar is red in color and is approximately four inches long and half of an inch wide at the widest part. The Board accepts Claimant's testimony that he

does not like it when people ask about the scar. Considering all the factors delineated in *Conway*, Claimant is awarded eight weeks of compensation for the disfigurement to the abdomen.

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. See *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).

Claimant was awarded fifty-seven weeks of compensation for nineteen percent permanent impairment to the low back. 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 3.65 weeks of compensation for the disfigurement of his abdomen. Since such amount is smaller than the disfigurement scale, the Board chooses to apply the greater award of eight weeks of benefits arrived under the disfigurement scale. For Claimant's abdomen, the appropriate scale in the instant case is the disfigurement scale, as it yields the greater award. *Bagley, supra*.

Based on the foregoing, Claimant is awarded \$3,946.80 for eight weeks of compensation for the disfigurement of his abdomen at his compensation rate of \$493.35 per week.

### **Attorney's Fee and Medical Witness Fees**

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against Horsey 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*. Claimant's counsel submitted an affidavit attesting to fifteen hours of preparation for this two-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 January 18, 2007, 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 it would be an abuse of 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, information presented and Horsey's failure to argue that an attorney's fee award is not appropriate, the Board finds that one attorney's

fee in the amount of \$4,125.00 is reasonable. *Del. Code Ann.* tit. 19, § 2320. This award 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.

As there is an award, medical witness fees are taxed as costs against Horsey. *Del. Code Ann.* tit. 19, § 2322(e).

**STATEMENT OF THE DETERMINATION**

Based on the foregoing reasons, Claimant's Petition to Determine Additional Compensation Due is GRANTED for \$28,120.95 for nineteen percent permanent impairment to the lumbar spine, as well as an award for 5,040 miles of travel for medical appointments. Claimant's Petition for Disfigurement Benefits is also GRANTED for \$3,946.80 for the surgical scar located on his abdomen. As there is an award, Claimant is also entitled to payment of medical witness fees and an attorney's fee in the amount of \$4,125.00.


IT IS SO ORDERED THIS 28<sup>th</sup> DAY OF AUGUST 2009.

**INDUSTRIAL ACCIDENT BOARD**

/s/ Lowell L. Groundland

/s/ Elaine Bowen

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

  
Julie G. Bucklin  
Workers Compensation Hearing Officer

Mailed Date: 8-31-09

  
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OWC Staff