

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

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EMMITT DEASCANIS,

Employee,

v.

DEASCANIS MASONRY, INC.,

Employer.

Hearing No. 1220338

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 March 22, 2005, in the Hearing Room of the Board, in New Castle County, Delaware. The time to publish this decision was extended on April 5, 2005.

PRESENT:

LOWELL L. GROUNDLAND

IRVING S. LEVITT

Kristopher T. Starr, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Michael Weiss, Attorney for the Employee

Timothy Casey, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Emmitt DeAscanis ("Claimant") was seriously injured in a 25-foot fall from a scaffold in September 2002. He sustained a neck fracture at the level of C7-T1 and is functionally quadriplegic. Claimant's wage at the time of injury was \$650.00 per week with a corresponding compensation rate of \$433.33. He has received compensation for impairment to multiple body parts.

On August 6, 2004, Claimant filed a Petition to Determine Disfigurement seeking compensation for deformity and wasting of multiple body parts. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified on his own behalf. Claimant is seventy-four years old. He was employed as a stone mason. He was proud of his appearance prior to his work accident. Now, he is embarrassed at his body appearance and condition. Claimant has some limited neck movement. He can barely move his right arm. He can move his left arm to his face and laterally. He tries to lift weights with his arms at times.

Claimant displayed multiple body parts to the Board. He has a neck scar that measures six inches in length by $\frac{1}{4}$ - $\frac{1}{2}$ inch in width. His left arm biceps circumference is 10 and $\frac{1}{4}$ inches. His left wrist circumference is 6 and $\frac{3}{4}$ inches. His right arm biceps circumference is 10 and $\frac{3}{4}$ inches. His right wrist circumference is 6 and $\frac{1}{2}$ inches. Claimant has an indwelling urinary drainage catheter permanently attached to his left leg. His left thigh circumference is 17 inches and his left calf circumference is 11 inches. His right thigh circumference is 15 and $\frac{1}{4}$ inches and his right calf circumference is 11 and $\frac{1}{4}$ inches. Claimant's chest circumference is 37 inches. He has a tracheostomy tube permanently affixed in the anterior portion of his lower neck.

Claimant's abdominal circumference is 36 and ½ inches and he has a percutaneous endoscopic gastrostomy ('PEG') tube permanently implanted in his abdominal wall.

Mrs. Elaine DeAscanis testified on behalf of Claimant. Mrs. DeAscanis has been married to Claimant for thirty-nine years. Prior to his work accident, Claimant had a strong build and was in good physical condition. During his work accident, Claimant fractured his neck in two places. Claimant cannot swallow. He has no shape to his buttocks and his legs are thin. He has lost bowel and bladder control. Claimant frequently apologizes for his current appearance.

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., slip op. at 7 (November 8, 1999).

The Board fully described the size, shape and location of scars, atrophic or wasted limbs, body parts and other adjunctive devices permanently made a part of Claimant's body in the Summary of Evidence, and it incorporates that description here. Claimant's injuries and

subsequent disfigurements are significant in nature. His limbs are wasted in appearance. He cannot move his legs and can barely move his arms. His chest is sunken, his abdomen distended and his face gaunt. Claimant has permanently implanted tubes in his trachea and abdomen, which are readily observable. He has a urine drainage tube attached to his left leg, which is readily apparent. It is blatant in appearance, and can be perceived on casual observation because of the nature of the disfigurement. The injury involves the arm, which renders it more visible than if it were on a more inconspicuous portion of the anatomy. From Claimant's testimony, this disfigurement causes great social and emotional distress. The injury is as significant as the most serious disfigurements, such as amputations or burn scars. Therefore, taking these considerations into account and rating Claimant's disfigurement on a scale from 0 to 150 weeks, the Board awards Claimant sixteen weeks (16) for his neck scar and head tilt due to his spine injury. The Board also awards Claimant twenty weeks (20) for his face, fifty weeks (50) for his right arm, forty-five weeks (45) for his left arm, forty weeks (40) for his chest, ten weeks (10) for his abdominal distention, one hundred fifty weeks (150) to each of his legs.

The Board does not generally grant disfigurement awards for adjunctive or assistive devices such as wheelchairs, canes, walkers, etc. However, in Claimant's case, he has two surgical openings, which were created to fit the appliances that help sustain his life. The Board finds that these surgical openings are disfigurements and the appliances that occupy these openings are no longer simple adjunctive devices but are, realistically, now part of Claimant's body. Accordingly, the Board awards fifty weeks (50) for Claimant's tracheostomy and the tracheostomy tube. The Board also awards fifty weeks (50) for Claimant's gastrostomy and the PEG tube. The Board further awards fifty weeks (50) for the Foley catheter tube as it is attached and visible on Claimant's left leg and is constantly present.

Claimant also requested that the Board award benefits for the appearance of the inability to walk and the inability to swallow. The Board denies these requests as they fall more accurately within the arena of permanent impairment. These requests cover loss of use and function of body parts. The Board finds that they are impairment issues and declines to grant an award for disfigurement.

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). The Board awarded multiple areas of disfigurement and will address them in order.

Neck

Claimant received 210 weeks (70%) of compensation for permanent impairment to the neck. The Board awarded sixteen weeks (16) of disfigurement. Applying the *Bagley* formula in this case results in the second scale being from 0 to 252 weeks (210 weeks of permanent impairment plus twenty percent, *i.e.*, 42 weeks). Under this scale, considering the factors set forth above, the Board would award 28.6 weeks of benefits. Claimant is awarded twenty-nine weeks (29) of benefits as this is the higher award.

RUE

Claimant received 237.5 weeks (95%) of compensation for permanent impairment to the right arm. The Board awarded fifty weeks (50) of disfigurement. Applying the *Bagley* formula in

this case results in the second scale being from 0 to 285 weeks (237.5 weeks of permanent impairment plus twenty percent, *i.e.*, 47.5 weeks). Under this scale, considering the factors set forth above, the Board would award ninety-five weeks of benefits. Claimant is awarded ninety-five weeks (95) of benefits as this is the higher award.

LUE

Claimant received 225 weeks (90%) of compensation for permanent impairment to the left arm. The Board awarded forty-five weeks (45) of disfigurement. Applying the *Bagley* formula in this case results in the second scale being from 0 to 270 weeks (225 weeks of permanent impairment plus twenty percent, *i.e.*, 45 weeks). Under this scale, considering the factors set forth above, the Board would award eighty-one weeks of benefits. Claimant is awarded eighty-one weeks (81) of benefits as this is the higher award.

RLE

Claimant received 250 weeks (100%) of compensation for permanent impairment to the right leg. The Board awarded one hundred fifty weeks (150) of disfigurement. Applying the *Bagley* formula in this case results in the second scale being from 0 to 300 weeks (250 weeks of permanent impairment plus twenty percent, *i.e.*, 45 weeks). Under this scale, considering the factors set forth above, the Board would award all three hundred weeks of benefits. Claimant is awarded three hundred weeks (300) of benefits as this is the higher award.

LLE

Claimant received 250 weeks (100%) of compensation for permanent impairment to the left leg. The Board awarded one hundred fifty weeks (150) of disfigurement. Applying the *Bagley* formula in this case results in the second scale being from 0 to 300 weeks (250 weeks of permanent impairment plus twenty percent, *i.e.*, 45 weeks). Under this scale, considering the

factors set forth above, the Board would award all three hundred weeks of benefits. Claimant is awarded three hundred weeks (300) of benefits as this is the higher award.

The Board does not perform a *Bagley* analysis on the abdomen, face or chest as no impairment awards were made to these body parts. The Board similarly does not perform an analysis for the ostomy holes or for the catheter.

Disfigurement Summary

<u>Body Part</u>	<u>No. of Weeks</u>	<u>Analysis</u>
Neck	29 weeks	<i>Bagley</i>
Face	20 weeks	Standard
Chest	40 weeks	Standard
Abdomen	10 weeks	Standard
Tracheostomy	50 weeks	Standard
Gastrostomy	50 weeks	Standard
Foley catheter	50 weeks	Standard
RUE	95 weeks	<i>Bagley</i>
LUE	81 weeks	<i>Bagley</i>
RLE	300 weeks	<i>Bagley</i>
LLE	300 weeks	<i>Bagley</i>

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 the average weekly wage calculates to \$7,857.50. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

Claimant has been awarded 160 weeks of compensation, or \$44,960.00, on account of her right arm deformity. Claimant's counsel submitted an affidavit stating that he spent fifteen hours preparing this workers' compensation case, which lasted about one hour. Claimant's counsel has been admitted to the Delaware Bar for over thirty years and he is experienced in workers' compensation law. His first contact with Claimant was in January 2003, so he has been representing Claimant for over two years. There is no evidence that counsel has represented Claimant in anything other than a workers' compensation context. Unlike most disfigurement cases, this matter was a bit more complex. There is no evidence to suggest that counsel was precluded from taking other cases because of accepting Claimant's case except as to representing the employer and the insurance carrier. It does not appear that counsel was subject to any unusual time limitations. Counsel's fee arrangement with Claimant is on a contingency basis. Counsel does not anticipate fees or expenses will be received from any other source. There was no suggestion that the employer lacks the financial ability to pay an attorney's fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of the \$4,800.00 (16 hours x \$300.00 per hour) is reasonable in this case.

STATEMENT OF THE DETERMINATION

For the reasons stated, the Board awards disfigurement benefits and an attorney's fee.

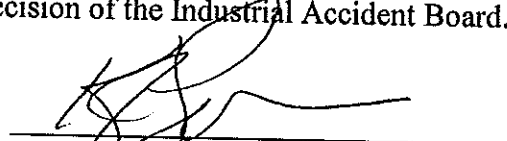
IT IS SO ORDERED THIS 19th DAY OF APRIL, 2005.

INDUSTRIAL ACCIDENT BOARD


LOWELL L. GROUNDLAND

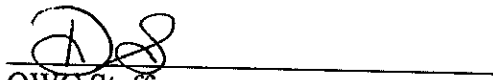

IRVING S. LEVITT

I, Kristopher T. Starr, Esquire, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.


KRISTOPHER T. STARR, ESQUIRE

Mailed Date:

4/20/05


OWC Staff