

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

JAYENDRA PATEL,

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Employee,

)

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v.

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Hearing No. 1302558

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LIBERTY PETROLEUM,

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Employer.

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**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 April 7, 2011, in the Hearing Room of the Board, in New Castle County, Delaware.

**PRESENT:**

JOHN D. DANIELLO

MARY L. DANTZLER

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

**APPEARANCES:**

Sean P. Gambogi, Attorney for the Employee

Loren Holland & Keri L. Morris, Attorneys for the Employer

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

Jayendrakumar A. Patel ("Claimant") was injured in a compensable work accident on May 1, 2007, while he was working for Liberty Petroleum ("Employer"). He injured his right leg and an area near his left eye. The injuries have been acknowledged as compensable. Claimant received certain workers' compensation benefits, including compensation for total disability. His wage at the time of injury was \$299.57 per week. His compensation rate for disfigurement benefits is \$199.72 per week.

On October 10, 2010, Claimant filed a Petition to Determine Disfigurement. A hearing was held on this petition on April 7, 2011. This is the Board's decision on the merits.

## **SUMMARY OF THE EVIDENCE**

Claimant testified that he is fifty-four years old.<sup>1</sup> He is no longer employed by Employer. On May 1, 2007, he injured his right leg and an area near his left eye when a man came into the store and began hitting him repeatedly with a baseball bat. Claimant has had seven surgeries on the right leg, including the implant of a rod. There was one surgery near the left eye. His last surgery was performed in March of 2009. The surgeries have left scars. His right leg is always swollen. The inside of the leg is itchy and the muscles get tight. The left cheek is always swollen. Claimant also walks with a limp. The scars and limp embarrass him. People laugh and look at his leg and limp as he walks with a cane.

Claimant displayed his disfigurements to the Board. The right leg has a bulbous protrusion near the knee. It is oblong in shape. It is about 3 inches by 2.5 inches and it is raised about half an inch. It is multi-colored with dark and light areas. To the right of this protrusion is a scar that is five inches long. The scar's width varies from a quarter to half an inch. To the left of the protrusion is another scar about 6.5 inches long. On top of this scar there is a darker

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<sup>1</sup> Claimant testified with the assistance of an interpreter, Vina Patel. Ms. Patel is not related to Claimant.

circular mark. Just above the knee there is another scar that is 1.75 inches long and about a quarter inch wide. It, like the other two scars, runs vertically down the leg. This scar is just slightly discolored compared to the surrounding skin. The Board compared the right leg to the left and noticed perceptible thigh swelling on the right side compared to the left.

With respect to the facial scar, it is on Claimant's left cheek. It is about a half inch long. The scar itself is not particularly discolored, but the left cheek area itself--in a patch of about four inches in diameter--is slightly darker than the surrounding skin.

Claimant also displayed his altered gait to the Board. He walked using his cane, explaining that he could not walk very far without it. Claimant has the sort of rolling gait one would expect from a knee that is not flexing properly.

Claimant submitted photographs of the disfigurement. The photographs are accurate in terms of showing size and location. They are not accurate in terms of reflecting the coloration of the disfigurements as seen by the Board. The discoloration seen by the Board was far worse than shown in the photographs.

## **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 the various disfigurements in the “Summary of the Evidence,” and it incorporates that description here.

By far, the most severe disfigurement is to Claimant’s right leg. The protrusion combined with the scars, swelling and discoloration create an ugly and offensive presentation. The lower leg would be clearly visible when a person is normally clothed. It is a substantial area of disfigurement, with each factor (protrusion, scarring, swelling, discoloration) drawing more attention to the other factors. This is a far more severe disfigurement than a simple surgical scar. The Board accepts that the right leg appearance causes substantial social and psychological impacts on Claimant. The disfigurement is large enough to be visible from a distance.

Taking into account all the discussed considerations and rating Claimant’s disfigurement on a scale from 0 to 150 weeks, the Board awards Claimant 50 weeks of benefits for the right leg disfigurement.

With respect to Claimant’s facial disfigurement, the scar itself is minimal, being small in size and not particularly apparent. The patch of discoloration is more noticeable. In addition, the Board takes into account that this scar and discoloration is on the face, which is the most readily visible part of the human body when normally clothed. Claimant did not mention any specific mental discomfort from the facial markings, but because of its placement on the face, a

certain level of embarrassment is likely. However, the facial disfigurement is comparatively minor compared to that of the right leg.

Taking into account all the discussed considerations and rating Claimant's disfigurement on a scale from 0 to 150 weeks, the Board awards Claimant 8 weeks of benefits for the facial disfigurement.

With respect to Claimant's gait, the Board has recognized that an altered gait, while primarily compensated for as a permanent impairment, also affects a person's appearance and might, therefore, be considered a "disfigurement." *Bonkowski v. New Castle County*, Del. IAB, No. 958387, op. at 4-5 (December 22, 1998). The Delaware Superior Court has stated that an altered gait is considered a disfigurement related to the lower extremity. *Streets v. Tim O'Connell & Son, Inc.*, Del. Super., C.A. No. 00A-01-012, Cooch, J., 2000 WL 1211522 at \*3 (July 21, 2000). Unlike more traditional disfigurements such as scars, a limp is difficult to quantify. *Bonkowski*, at 4-5. This renders some of the *Conway* factors, such as size and shape, inapplicable. Also unlike other disfigurements, an altered gait is within the subjective control of the litigant, requiring the fact finder to make a credibility judgment.

The Board is satisfied that Claimant made a good faith effort to walk normally and it would classify his limp as being a mild rolling gait. Unlike most scars, the altered gait would be readily apparent to an observer from a distance. Claimant testified that it causes him some embarrassment as people stare at him, and the Board accepts this as true.

Taking into account all the discussed considerations and rating Claimant's disfigurement on a scale from 0 to 150 weeks, the Board awards Claimant six weeks of benefits for his altered gait.

The Board, therefore, awards a total of 64 weeks of compensation for Claimant's disfigurements.

### **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 \$9,147.30. However, the total value of Claimant's award is \$12,782.08, so the thirty percent cap applies and the maximum possible fee is \$3,834.62.

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 64 weeks of benefits. Claimant's counsel submitted an affidavit stating that 3 hours were spent preparing for the hearing. The hearing itself was brief, lasting only about fifteen to twenty minutes. Claimant's counsel was admitted to the Delaware Bar in 2010 and he has some familiarity with workers' compensation litigation. Counsel's firm's initial contact with Claimant was in January of 2009, so the period of representation has been for over two years. Like most disfigurement hearings, this case was basic involving little more than asking a few simple questions of Claimant and displaying the disfigurements to the Board. It involved no difficult question of fact or law and it required only minimal 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. 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 if any such offer of employment had been made. Counsel's fee arrangement with Claimant is on a twenty-five percent contingency basis. He notes that his normal fee for trial work is \$200.00 per hour and \$250.00 per hour for appeal work. 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 basic 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 \$750.00 is proper and reasonable in this case.

## STATEMENT OF THE DETERMINATION

For the reasons stated, the Board awards Claimant a total of 64 weeks of compensation for his disfigurements. Claimant is also awarded an attorney's fee in the amount of \$750.00.

IT IS SO ORDERED THIS \_\_\_\_\_ DAY OF APRIL, 2011.

### INDUSTRIAL ACCIDENT BOARD

/s/

JOHN D. DANIELLO

/s/

MARY L. DANTZLER

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

/s/

Mailed Date: 4/12/11

/s/

OWC Staff