

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JOHN MORGAN,

Employee,

v.

DANELLA CONSTRUCTION,

Employer.

Hearing No. 1205692

*Designated in
Catastrophic
Injury Case*

PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE

The above-captioned matter came before the Industrial Accident Board on June 24, 2004,
in the hearing room of the Board in Wilmington, Delaware.

INDUSTRIAL ACCIDENT BOARD

LOWELL G. GROUNDLAND

ELAINE S. BOWEN

Michael L. Ripple, Hearing Officer for the Industrial Accident Board

Appearances:

Cassandra F. Roberts, Attorney for Claimant
R. Stokes Nolte, Attorney for Employer

NATURE AND STAGE OF THE PROCEEDINGS

Presently before the Industrial Accident Board (the "Board") is a Petition to Determine Additional Compensation Due, filed by John Morgan ("Claimant") against Danella Construction ("Danella"). In his petition, Claimant alleges that he suffered permanent disfigurement to numerous areas of his body because of a work accident on February 4, 2002. Danella does not challenge either Claimant's injuries or his entitlement to benefits. Instead, Danella defers to the Board's discretion of any award.

The matter originally came before the Board on June 24, 2004. Subsequently, the Board advised the parties of the need for an extension in this matter to locate the appropriate compensation rate. *See* 19 Del. C. § 2348(k). What follows is the final decision of the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant seeks an award from the Board pursuant to title 19, section 2326 (f) of the Delaware Code. In pertinent part, section 2326 (f) provides that

[t]he Board shall 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, which shall be paid to the employee at the rate of 66 2/3 percent of wages. In the event that the nature of the injury causes both disfigurement to and loss or loss of use of the same part of the human body, the maximum compensation payable under this subsection for that part of the body shall be the higher of either (1) the amount of compensation found to be due for disfigurement without regard to compensation for loss of or loss of use, or (2) the amount of compensation due for loss of or loss of use plus 20% thereof for disfigurement.

See 19 Del. C. § 2326 (f). By stipulation of the parties, the Board made the following findings regarding Claimant's injuries:

- A). Claimant has lost both his left upper extremity and right foot. Claimant lost the left upper extremity on the date of injury and the right foot on May 20, 2003.

B). Claimant suffered permanent "burn like" injuries to the left side of his face. The injuries appeared reddish in color, akin to sunburn, and covered the entire left cheek area. Claimant's lips also appeared swollen and cracking.

C). On the left lower extremity, in the thigh and calf region, Claimant exhibited "slight discoloration" from the surrounding skin caused by skin grafting. The visible portion on the thigh measured four inches by six inches, and above the left ankle at eight inches by four inches. On the right lower extremity, a graft area also on the thigh region measured four inches by seven inches.

D). Claimant produced a pronounced altered gait while walking despite the aid of a brace on the right lower extremity.

E). On the right front of his torso, Claimant exhibited an area measuring fourteen inches by thirteen inches, pinkish and purple in color. The area resembled injuries consistent with a burn injury. On the left side, Claimant's injuries covered the entire torso and flank areas extending to his lower back area.

F). On his left lower back, Claimant displayed a burn injury measuring sixteen inches by five inches. On the right side, the burn injuries measured thirteen by twelve inches.

G). Claimant displayed visible sweat glands to his chest area, reddish in color. The glands were evidently not visible prior to the injury.

H). Claimant lost his left nipple.

I). Claimant suffered a burn area, roughly the size of a quarter, to his right hand.

When considering the number of weeks of compensation, the Board should consider (a) the size, shape, and location of the disfigurement, (b) the social and psychological impacts suffered by Claimant, (c) the comparative severity of the disfigurement, (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 also Murtha v. Continental Opticians, Inc.*, Del. Supr., No. 395, 1997, Walsh, J. (January 16, 1998)(Order)(adopting the *Colonial Chevrolet* standard as the accurate interpretation of 19 Del. C. § 2326(g)). Evaluating the impact and severity of a disfigurement is inherently subjective and not amenable to measured calculation. *See Roberts v.*

Capano Homes, Inc., Del. Super., C.A. No. 99A-03-013, Del Pesco, J. slip. op. at 7 (Nov. 8, 1999).

Danella stipulated as to the compensability of the injuries. Thus, the Board applied the analysis set forth in *Colonial Chevrolet*, supra, to determine the weeks of compensability for each body part affected. Under such a standard, the Board finds that Claimant unquestionably suffered severe and permanent injuries to various locations on his body due to the February 4, 2002 accident. More specifically, the Board describes the injuries as one of the most serious cases ever presented before this tribunal. The evidence clearly demonstrated that Claimant lost two body parts and suffered gruesome burns over a substantial portion of his body. Whether Claimant suffers a psychological impact from the injuries is self-evident. See generally *Bagley v. Phoenix Steel Corporation*, 369 A.2d 1081 (Del. 1986).

From such findings, the Board believes that Claimant is entitled to compensation for permanent disfigurement injuries. See 19 Del. C. § 2326(f). Accordingly, the Board awards three hundred weeks of compensation for the loss of the left upper extremity and one hundred and ninety-two weeks for loss of the right foot. Both figures were agreed upon among the parties. However, the Board declines to award compensation for the altered gait, finding that compensation for the loss of Claimant's right foot encompasses such a request.

As to the burn on the right hand, the Board assigns two weeks of compensation. For the injuries to the chest area, including the flank areas on both sides of Claimant's body, the Board awards the statutory maximum of one hundred and fifty weeks. Said award incorporates the loss of the left nipple and appearance of sweat pimples post-dating the injury. As for the back, the Board again assigns the statutory maximum of one hundred and fifty weeks of compensation. For burns to the face, the Board finds that Claimant is entitled to compensation in the amount of

seventy-five weeks. Lastly, the Board awards eighty-four weeks of compensation for the skin grafts to both legs. The Board arrives at this calculation by awarding a week of compensation for each inch of visible skin graft.

Despite these findings, the Board cannot calculate a total monetary figure at this time. The Board notes that neither the file nor testimony from the hearing produced a compensation rate for Claimant at the time of injury. The Board hopes both parties will satisfactorily resolve this outstanding matter. However, should such an agreement not occur as to a compensation rate, the Board will entertain further testimony on this issue.

Attorney's Fees

Pursuant to 19 *Del. C.* § 2320(g)(1), whenever an award grants compensation, that claimant is entitled to payment of a reasonable attorney's fee in an amount not to exceed thirty of the award or \$7,602.10, whichever is smaller. Such fees are not awarded, however, unless counsel for Claimant submits an affidavit which complies with the factors listed in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

In the instant matter, counsel submitted an affidavit requesting the Board award such fees. The Board reviewed the request and finds that the affidavit complies with the factors established in *Cox*. The *Cox* factors include:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fees customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and the length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) Whether the fee is fixed or contingent;
- (9) The employer's ability to pay; and

(10) Whether fees and expenses have been or will be received from any other source.

See Cox, 304 A.2d at 57. Consideration of these factors does not prohibit the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded. *See Heil v. Nationwide Mutual Ins. Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J. (Aug. 9, 1996).

The Board makes the following findings based on the submitted affidavit. Counsel indicates that the professional relationship started on June 4, 2003 and that she spent six hours in preparation for the hearing. The issue in this case did not appear to have been particularly novel or difficult, nor does acceptance of this case effectively preclude counsel from other employment opportunities. Her fee is contingent and no special time limitation appears to have been imposed by either Claimant or the circumstances. In other matters such as the instant petition, counsel normally charges at an hourly rate of two hundred and eighty dollars per hour. Notwithstanding her agreement with Claimant, counsel does not expect to receive any other compensation in this matter from outside sources. In response to the financial ability to pay any such award, Danella does not dispute counsel's assertion.

No doubt, Claimant has received a benefit because of his counsel's efforts to receive disfigurement benefits in this matter. In light of the foregoing, the Board finds Claimant's request for \$1,680.00 in attorney's fees is reasonable and warranted. Such an award is clearly within the maximum permitted by statute. *See 19 Del. C. § 2320(g)(1)* (stating that compensation cannot exceed thirty percent of the award).

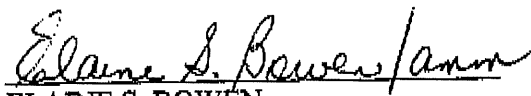
STATEMENT OF THE DETERMINATION

Based on the foregoing, Claimant's Petition to Determine Additional Compensation Due is GRANTED. Danella shall also compensate Claimant for attorney's fees of \$1,680.00.

IT IS SO ORDERED, this 19th day of July 2004.

INDUSTRIAL ACCIDENT BOARD


LOWELL G. GROUNDLAND


ELAINE S. BOWEN

Mailed Date: 7-19-2004



OWC Staff