

**BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE**

JOSE MEDINA AYALA a/k/a HEMBER )  
MORALES-PORTILLO, )  
 )  
Employee, )  
 )  
v. )  
 )  
DIAMOND STATE RECYCLING CORP., )  
 )  
Employer. )

Hearing No. 1354859

**DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE  
AND PETITION TO DETERMINE DISFIGUREMENT**

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated causes came before the Industrial Accident Board on May 31, 2013, in the Hearing Room of the Board, in Wilmington, Delaware.

**PRESENT:**

LOWELL GROUNDLAND

MARILYN J. DOTO

Susan D. Mack, Workers' Compensation Board, for the Board

**APPEARANCES:**

Cynthia H. Pruitt, Esquire, Attorney for the Employee

Scott Silar, Esquire, Attorney for the Employer

## NATURE AND STAGE OF THE PROCEEDINGS

On December 14, 2012, Jose Medina Ayala a/k/a Hember Morales-Portillo<sup>1</sup> (“Claimant”) filed a Petition to Determine Additional Compensation Due and a Petition to Determine Disfigurement. He is seeking compensation for permanent impairment and disfigurement to several body parts as a result of a compensable work accident on May 21, 2010. The parties narrowed the issues prior to the hearing to the following: the maximum weeks for total loss of the biliary tract; the maximum weeks for total loss of the pelvis; and the appropriate disfigurement awards for various injured body parts and an altered gait, with a *Bagley* analysis applied to the lower extremity disfigurement awards.

A hearing was held on Claimant’s petition on May 31, 2013. This is the Board’s decision on the merits.

## SUMMARY OF THE EVIDENCE

Stipulation of Facts: The parties stipulated that Claimant sustained catastrophic blunt trauma and crush injuries in a compensable work accident on May 21, 2010. His injuries included L1 paraplegia, L4-5 fracture, L1-4 transverse process fractures, ASIA B incomplete sensori-motor with flaccid paraplegia, abdominal compartment syndrome, pelvis fracture, multiple rib fractures, and open tibia fracture. The parties agreed to the following permanency ratings: thoracic spine/ribs, 11 percent; lumbar spine, 31 percent; pelvis, 23 percent; left lower extremity, 91 percent; right lower extremity, 91 percent; bowel/ano-rectal dysfunction, 50 percent; bladder, 40 percent; sexual function, 60 percent; biliary tract disease, 16 percent; abdominal wall, 30 percent. Claimant’s compensation rate is \$203.55 per week.

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<sup>1</sup> Claimant filed his case initially under the name Hember Morales-Portillo, a false name under which he worked for the Employer. Claimant later provided his true name, Jose Medina Ayala, so that is the name which the Board will use in this decision.

Dr. Jeffrey Meyers, a specialist in physical medicine and rehabilitation, testified by deposition on behalf of Claimant Jose Medina Ayala. (Claimant's Exhibit 1) Dr. Meyers examined Claimant on March 9, 2011 and June 5, 2012 for the purposes of rating permanency. Claimant suffered a catastrophic injury with polytrauma to his body while working for Diamond State Recycling as a laborer. In the accident, a very heavy spool of copper fell from a forklift onto Claimant's abdominal area, resulting in a crush injury, with open pelvic fracture and abdominal hemorrhage that led to hypotension, a spinal cord injury, paraplegia, and multiple other pathologies including multiple organ injuries. As a result of the accident, Claimant underwent at least fourteen major surgeries. One of these procedures, called a cholecystostomy, involved placement of a tube into the gallbladder area for drainage and decompression.

Dr. Meyers observed that Claimant had significantly limited walking ability. At the first exam Claimant reported that he could walk less than 100 feet with an assistive device. Claimant subsequently gained weight, and at the second exam in June 2012 he reported that he could walk only about ten feet, with poor balance and with use of an assistive device. Claimant spent most of his days in a wheelchair. All community mobility was done with the wheelchair. He required mechanical support to perform transfers from sitting to standing and standing to sitting. Claimant spent most of his day in bed or in a wheelchair. He needed to have family with him all day long. At the March 2011 exam, Dr. Meyers noted that Claimant ambulated fifteen feet with handheld assist, with fair to poor balance and fatigue.

Based on the two exams, Dr. Meyers diagnosed Claimant with 25 conditions related to the work accident. These included post-cholecystitis post-cholecystostomy drain placement, pelvic fracture with pelvic disruption status post closed reduction, and gait/ambulation dysfunction. Claimant suffered an open pelvic fracture, in which the pelvis was crushed and caused pelvic

disruption and widening of the symphysis pubis where the two pelvic bones come together. The separation was significant at more than a centimeter. In the pelvic area, Claimant also suffered a disrupted left sacroiliac joint, a fracture of the right acetabulum, and a large hematoma that required multiple surgeries to drain. Claimant had persistent discomfort in the area. Dr. Meyers used Chapter 15, Table 15-9, Sections 3-E and 3-F of the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition (“AMA Guides”) to rate Claimant with 17 percent whole person impairment, or 23 percent regional impairment of the pelvis. Dr. Meyers used the lumbar spine conversion factor to calculate a regional impairment. Claimant also continued to have intermittent biliary tract irritability that caused pain and discomfort with foods. A surgical procedure had placed a cholecystostomy drain for cholecystitis. Dr. Meyers used Chapter 6, page 133, Table 6-8 of the *AMA Guides* to place Claimant into Class 2 impairment and accordingly rated Claimant with a 16 percent impairment due to biliary tract disease.

Claimant Jose Medina Ayala testified that he is 32 years old and was in very good health before the accident. He was able to walk and run. Claimant has two children, ages 7 and 9. Claimant tries to walk a little bit each day while at home. He does not walk outside of his home, because he fatigues quickly. He walked about twenty steps for the Board to see, and he testified that he can walk a little farther than that. Claimant stated that he tries to “throw” his legs forward to walk. He believed his back impairs his ability to walk. He estimated spending about five to ten minutes walking in the course of a day, mostly for trips to the bathroom. His home has two floors, and he sleeps on the second floor. Claimant goes up the stairs by holding bars at the sides of the stairs and throwing his legs up on each step. He sees a physical therapist three times a week in an effort to improve his ability to walk and also uses a machine at home. Claimant agreed that he places more weight on his hands than on his legs when he is walking with a walker.

Claimant testified that he feels embarrassed and bad when people watch him walking. Claimant also feels bad about the scars on his chest and back, and he no longer takes his shirt off in public, whereas he did prior to the accident. If he took his shirt off, people would stare at him. People have asked him about the scars, and this makes him feel bad. One of his children cried when she saw the scars.

The Board observed the following with regard to the various disfigurements:

<b>Location</b>	<b>Observations</b>
Neck scar/tracheotomy	In front of neck. Raised, dark in color, mottled/puckered in appearance, slightly indented. 1/2 in x 1/2 in.
Left arm scar	Located just above the elbow. Raised and oval in shape. 1/2 in x 1/4 in.
Right kneecap scar, midline	Vertical, midline over kneecap. 2.5 in x 1/2 in.
Right kneecap scars, offset	Small scars offset on side of knee. Each scar is 1/2 in x 1/16 in.
Right ankle scar	Inside of ankle stitch marks. Lighter color than surrounding skin, pinkish. 1.5 in x 1/8 in.
Center abdomen scar	Vertical, down center of abdomen. Lighter than surrounding skin, pinkish, irregular in shape. 10 inches long, 1-1/4 inch wide at widest. 2 inches of scar is much narrower.
Right side/abdomen scar	Located above right hip and toward belt line. Extremely indented/concave wound with one inch depth. Scar is 6 inches long and about 1 inch wide. White/pink color and mottled.
Right upper abdomen scar	Located about 7 inches below armpit on right side. Indented, puckered. 1-1/2 inch x 7/8 inch at widest.
Right upper chest scar	Portal scar. Circular, raised, dark, keloids. 1/2 inch diameter.
Left upper chest scar	Portal scar. Circular, raised, dark, keloids. 1/2 inch diameter.
Lumbar surgical scar	Vertical surgical scar on low back. Pink with raised keloids on lower segment. 6 inches long. Varies from 1/8 to 1/2 inch wide.
Low back scar	Horizontal scar across entire low back from crush injury. Lighter than surrounding skin, pinkish. 11 inches long. Irregular width ranging from 1 inch to 2-1/8 inch.
Gait	Claimant stood up and used walker to walk forward, turn, and walk back to his seat. Swings or moves legs forward while leaning on walker.

Claimant submitted into evidence a description of the biliary system from NIH/MedlinePlus.  
(Claimant's Exhibit 2)

Photographs of the various scars were submitted into evidence. (Claimant's Exhibit 3)

The Employer submitted into evidence a description of the biliary tract from Wikipedia (Employer's Exhibit 1), and a description of the biliary system from a website published by the Ohio State Medical Center (Employer's Exhibit 2).

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Disfigurement**

The Board may award disfigurement benefits "provided that such disfigurement is visible and offensive when the body is clothed normally." 19 *Del. C.* § 2326(f). "Clothed normally" means such clothing as is normally worn by the claimant when involved in regular activities, including recreational, vocational, and avocational activities. *Beam v. Chrysler Corp.*, 332 A.2d 143,145 (Del. 1975). Factors that the Board should consider in determining the number of weeks of benefits awarded are the size, shape and location of the disfigurement; the social and psychological impacts suffered by the claimant; the comparative severity of the disfigurement; and other relevant matters. *Colonial Chevrolet v. Conway*, No. 79A-FE-13, Longobardi, J. (Del. Super. Ct. Apr. 28, 1980); *see Murtha v. Continental Opticians, Inc.*, No. 395,1997, Walsh, J. (Del. Jan. 16, 1998)(Order)("We adopt the *Colonial Chevrolet* formulation as an accurate and appropriate interpretation of the statutory mandate."). Evaluating the impact and severity of a disfigurement is inherently subjective and not amenable to measured calculation. *Roberts v. Capano Homes, Inc.*, C.A. No. 99A-03-013, 1999 WL 1222699, at \*3 (Del. Super. Ct. Nov. 8, 1999). In evaluating the subjective components of a disfigurement, the Board may rely upon its accumulated experience. *Id.* The Board may award "proper and equitable compensation for serious and permanent disfigurement to any part of the body

up to 150 weeks.” DEL. CODE ANN. tit. 19, § 2326(f). Claimant is entitled to benefits at the rate of \$203.55 per week, by stipulation of the parties.

### *Scars*

The Board first considers the numerous scars presented for disfigurement awards. The various scars and their locations are described in the Summary of the Evidence. Claimant testified that the scars embarrass him and attract attention and that he keeps his shirt on to hide some of the worst scarring from public view. The Board finds all of the scars to warrant an award of benefits, because they are offensive in appearance and visible while normally clothed. The award amounts vary with the size, location, and appearance of the scars. All of the awards are made initially on a scale of 0 to 150 weeks. DEL. CODE ANN. tit. 19, § 2326(f).

The Board finds the most offensive scar to be the one located on the right side of the abdomen and therefore awards 25 weeks of benefits for this disfigurement. In particular, the Board considered the extreme indentation of the scar along with its large size and distinctive coloration in making this award.

The vertical scar down the center of the abdomen and the horizontal scar all the way across the lower back also justified large disfigurement awards due to their large sizes, prominence, irregular widths, and light colorations that set them apart from the surrounding tissue. The Board therefore awards 20 weeks for each of these scars.

The Board awards 15 weeks of benefits for the neck scar from the tracheotomy due to its highly visible location on the front of the neck and its particularly offensive appearance from its dark color and raised and puckered surface.

The scar on the right shin also warrants a disfigurement award of 15 weeks, because of its large size, highly irregular and jagged shape, indented surface, and coloration lighter than the surrounding tissue.

The Board awards 10 weeks of benefits for the surgical scar on the low back, in particular because of the six inch length and the pink color and raised keloids on the lower segment of the scar.

As for the additional abdomen scar, the Board finds that 4 weeks of benefits for the scar on the right upper abdomen would appropriately compensate Claimant. Although the scar is relatively small compared to the other abdominal scars, it is offensive in appearance due to its indented and puckered surface.

The two portal scars on the upper chest are less offensive than the other abdominal and chest scars because of their small size, though they are easily visible due to their dark color and keloids. The Board awards 2 weeks of benefits for each of these scars.

The Board next considers the scars located on the right knee. The Board awards six weeks of benefits for the vertical scar over the midline of the kneecap based on its 2-1/2 inch length, half inch width, and relatively prominent location. The scars on the sides of the knee warrant only one week of benefits total because of their small size and relatively inoffensive appearance.

Finally, the Board considers the scar on the right ankle. The Board awards two weeks of benefits for this scar, based on the 1-1/2 inch length and the less visible location on the inside of the ankle. The scar does stand out from the surrounding tissue due to its light coloration.

### ***Gait***

Claimant also seeks disfigurement benefits for an altered gait. Claimant testified that he spends most of his time in a wheelchair, but he does walk for a total of five to ten minutes a day



inside his home with the use of a walker or other supports. He demonstrated his walk to the Board with the use of a walker.

The Board has previously recognized that an altered gait, while to some extent compensated for as a permanent impairment, also affects a person's appearance and might, therefore, be considered a bodily "disfigurement." *Bonkowski v. New Castle County*, Del. IAB, No. 958387, op. at 4-5 (December 22, 1998). However, if a Claimant is so impaired that she essentially has no gait, this does not mean that she is entitled to a bodily disfigurement award. *See Dean v. Three Little Bakers*, C.A. No. 99A-05-008, 1999 WL 1441998 at \*4 (Del. Super. Ct. Nov. 19, 1999) (no award for altered gait because limp not demonstrable for the Board). Non-anatomical factors are not properly considered as part of a disfigurement because, as the statute makes clear, a disfigurement must be to a "part of the human body." DEL. CODE ANN. tit. 19, § 2326(f). Therefore, a wheelchair is not, in and of itself, disfiguring, and the Board does not consider canes, walkers, or braces as an element of disfigurement. The Board's role in viewing a disfigurement is to evaluate the anatomical variation resulting from an industrial accident. *Antonelli v. E. Earle Downing, Inc.*, Del. IAB, No. 546483, at 3 (December 4, 1997). *See also Dean v. Three Little Bakers*, Del. IAB, No. 1056507, at 3-4 (April 29, 1999), *aff'd*, C.A. No. 99A-05-008, 1999 WL 1441998 (Del. Super. Ct. Nov. 19, 1999). The only exception to this rule is when a device has been made a permanent part of the anatomy, such as permanently affixed tracheostomy or catheter tubes. *See DeAscanis v. DeAscanis Masonry, Inc.*, Del. IAB, Hearing No. 1220338, at 4 (April 20, 2005).

The Board here concludes that Claimant is entitled to an award of disfigurement benefits for his altered gait. Claimant does use a wheelchair most of the time indoors and also when he is out in public. Nonetheless, Claimant walks with the aid of a walker for five to 10 minutes a day and was able to demonstrate this walk for the Board. This case can therefore be distinguished from that in

*Dean v. Three Little Bakers*, where the Superior Court affirmed the Board's rejection of a claim for disfigurement benefits based on an altered gait, because Claimant never demonstrated his limp for the Board. The claimant in *Dean* was confined to a wheelchair and did not provide any medical reason why he could not safely get up from the wheelchair to demonstrate his limp for the Board. The Board therefore found it had insufficient evidence of disfigurement from an altered gait. Claimant in the case at hand, Jose Ayala, shares many similarities to the claimant in *Dean* in that Ayala is largely confined to a wheelchair and can only walk around the house if he has something to steady himself on. Both claimants use a wheelchair outside of the home. Ayala, however, was able to get up from his wheelchair and demonstrate his walk to the Board at the hearing with the assistance of a walker. Claimant Ayala therefore met his burden to present evidence of his altered gait.

The Board proceeds to consider the appropriate number of weeks to compensate Claimant for his altered gait. On the one hand, Claimant does not walk when he is out in public and rarely walks at home, so his altered gait would not usually be on display for anyone to notice or to cause embarrassment. On the other hand, when Claimant does walk, he moves in an extremely slow and laborious fashion where he "swings" his legs forward one at a time as he rests much of his weight on the walker. On balance, the Board concludes that 15 weeks is an appropriate award in this case. Claimant has a severely altered gait, but this disfigurement is rarely on display to anyone outside of his immediate family. The attention attracted by use of the walker or the wheelchair cannot be considered by the Board in reaching its rating.

### ***Bagley Analysis***

The parties reached agreement on the permanency awards for each of the injured body parts and set them forth in the stipulated facts presented at the hearing. Claimant contends that the large

degree of permanent injury to each lower extremity, 91 percent, requires an adjustment in several disfigurement awards under the *Bagley* analysis. The Board agrees that, in cases where a body part has suffered a permanent impairment as well as a disfigurement to a part of the body, it must (1) rate the number of weeks on the standard 0 to 150 scale; (2) calculate the number of weeks on a scale between zero 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. DEL. CODE ANN. tit. 19, § 2326(f); see *Bagley v. Phoenix Steel Corp.*, 369 A.2d 1081, 1083-84 (Del. 1977). In practice, the *Bagley* analysis can only result in a higher disfigurement award in cases where permanency (in number of weeks) plus twenty percent is more than 150 weeks. In this case, the only body parts where both disfigurement and permanency were at issue and the permanency rating plus twenty percent is greater than 150 weeks are the left and right lower extremities. The Board will therefore go through the *Bagley* analysis for any disfigurements related to these body parts.

The Board has awarded disfigurement benefits of one week, two weeks, six weeks, and fifteen weeks for scars located on the right lower extremity, for a total of 24 weeks of benefits. By agreement of the parties, Claimant will receive 227.5 weeks of compensation for a 91 percent permanent impairment to the right lower extremity. The adjusted *Bagley* scale for the right lower extremity is therefore 0 to 273 weeks (227.5 weeks plus 20%). If the *Bagley* scale is applied, Claimant would receive approximately 43.7 weeks of benefits for his scars on the right lower extremity. Comparing this award to the award under the 0 to 150 standard scale, the Board finds the award of 43.7 weeks under the 0 to 273 scale results in the greater award in this case.<sup>2</sup>

The Delaware Superior Court has also stated that an altered gait is considered a disfigurement related to the lower extremity. *Streets v. Tim O'Connell & Son, Inc.*, C.A. No. 00A-01-012, Cooch,

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<sup>2</sup> *Bagley* requires a comparison of the disfigurement award on the 0 to 150 scale to the same award on the so-called

J., 2000 WL 1211522 at \*3 (Del. Super. Ct. July 21, 2000). *See also Kelly v. Sentinel Self Storage*, Del. IAB, Hrg. No. 1242250 at 15-16 (March 27, 2006). The Board will therefore apply the *Bagley* analysis to the disfigurement award for an altered gait, which was 15 weeks on the standard 0 to 150 scale. On an adjusted *Bagley* scale of 0 to 273 weeks for the lower extremity (227.5 weeks plus 20%), Claimant would receive approximately 27.3 weeks of benefits for the altered gait disfigurement. Comparing this award to the 15-week award under the standard scale, the Board finds the award of 27.3 weeks under the 0 to 273 scale results in the greater award in this case.

### **Permanency Issues**

The parties reached agreement as to the percentage loss of function for the various injured body parts; however, the percentage ratings assigned to the biliary tract and the pelvis are for so called “unscheduled losses,” that is, functional losses to body parts that are not specifically included in Section 2326(a). Section 2326(g) leaves it to the Board’s discretion to determine the number of weeks (up to 300 weeks) to allow as “proper and equitable” for a loss of any member or body part or loss of use of any member or body part that is not a “scheduled” impairment under Section 2326. DEL. CODE ANN. tit. 19, § 2326(g). The award should bear a proper relationship to the specific awards provided for scheduled impairments, *Alloy Surfaces Co. v. Cicamore*, 221 A.2d 480, 482-83 (Del. 1966), and the Board’s decision should demonstrate what the relationship is, *Asplundh Tree Expert Co. v. Clark*, 369 A.2d 1084, 1088 (Del. Super. Ct. 1975), *aff’d*, 372 A.2d 537 (Del. 1977). The parties disagreed as to the appropriate maximum number of weeks to assign to the biliary tract and the pelvis.

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*Bagley* scale, which is 0 to (the permanency award plus twenty percent). The comparison is one of ratios.

### ***Biliary Tract***

The parties have agreed that Claimant has suffered a 16 percent permanent impairment of his biliary tract as a result of the work injury. They are unaware of any precedent establishing the maximum number of weeks for a total functional loss to the biliary tract and thus ask the Board to determine the appropriate scale under Section 2326(g). Claimant argues that 300 weeks is the appropriate maximum, comparing the biliary tract to the lymphatic system or a major organ such as the liver, which has been assigned a maximum scale of 300 weeks. Claimant further explains that the biliary tract includes the gall bladder, bile ducts, and certain cells in the liver, so it is properly considered a system, not simply the gall bladder as an individual organ. The Employer concedes that the liver has been assigned a maximum of 300 weeks, but it asserts that the biliary tract is more comparable to the spleen, which has been assigned a maximum scale of 60 weeks in the past (*see Phoenix Steel v. Kubinek*, C.A. 78A-De-3 (Del. Super. Ct. July 25, 1980)). The Employer further asserts that the permanent injury is related primarily to the gall bladder rather than the biliary tract, so a 300-week maximum would be too high in this case.

Several descriptions of the biliary tract/system were provided by the parties to the Board to assist in its determination of an appropriate maximum number of weeks. (Claimant's Exh. 2, Employer's Exhs. 1 & 2). The descriptions vary somewhat in their specificity and terminology, but they are consistent in describing the biliary tract as consisting of the bile ducts, the gallbladder, and associated structures that carry bile secreted by the liver to the duodenum. The more detailed description from the Ohio State Medical Center internet site (Employer's Exh. 2) explains that the biliary system's main functions are to drain waste product from the liver into the duodenum, through the secretion and transport of bile, and to help in digestion through the controlled release of bile into the duodenum. About 50 percent of the bile produced by the liver is stored in the gallbladder for

controlled release when food is eaten. *Id.* Thus, the gallbladder is only part of the biliary tract, both in structure and in function. In addition to the documents provided by the parties, the Board reviewed the portion of the Fifth Edition of the *AMA Guides* that relates to the biliary tract and the liver. In Section 6.5, the *AMA Guides* provide separate tables for rating permanency due to biliary tract disease and liver disease. *AMA Guides* at 133. No provision is made for rating the gall bladder separately from the biliary tract. The Board concludes from the above that it is reasonable to consider the biliary tract as a whole to rate permanency rather than limiting its consideration to the gall bladder alone.

Claimant asserts that the biliary tract has a similar importance to a person's function as a major organ such as the liver or a major system such as the lymphatic system, whereas the Employer believes the biliary tract is more comparable to a minor organ such as the spleen. The Board believes the *AMA Guides* support Claimant's view of the biliary tract's importance, because the maximum impairment rating for the biliary tract provided for in Section 6.5 is 95 percent of the whole person. Thus, the most severe impairment to the biliary tract would result in almost complete functional impairment of the whole person, just as it would for the liver.<sup>3</sup> This high degree of potential impairment from total loss of the biliary tract function demonstrates how essential the biliary tract is to the overall function of the human body. In comparison, one hundred percent loss of a lower extremity would equate to only 40 percent impairment of the whole person. *See AMA Guides* at 527 (Table 17-3). The Board further notes that a splenectomy, or removal of the spleen, could result in *no* permanent impairment, according to Example 9-9 from the chapter on the hematopoietic system in the *AMA Guides*. *See AMA Guides* at 200. The Board infers from this example that the spleen is

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<sup>3</sup> The Board previously stated in another case that the 95 percent maximum permanency rating for the liver in the *AMA Guides*, which is impairment of the whole person, shows the importance of the liver to the whole body. The Board explained that the maximum whole person rating was nearly 100 percent because the liver is so essential to the continued functioning of the whole body. *Sanchez v. Mario Medora, Inc.*, Del. IAB, Hrg. No. 1250854, at 8 (July

of much less importance to the whole person than the biliary tract, since complete removal of the organ could result in no permanent functional impairment at all. The Board concludes from the above discussion that the biliary tract is of similar importance to the function of the whole person as the liver and that the total loss of the biliary tract function would create more of a problem to the overall function of the whole person than total loss of a lower extremity.<sup>4</sup> Therefore, the Board finds it “proper and equitable” that the maximum number of weeks for loss of the biliary tract function should be the maximum available under Section 2326(g), or 300 weeks.

The Employer was concerned that the injury in this case was primarily to the gall bladder, citing the installation of the cholecystostomy drain, and that a 300-week maximum rating would therefore be too high. The Board, however, believes the limited damage to the biliary tract’s function as a whole is accounted for by Dr. Meyers’ placement of Claimant at the lower end of Class 2 in Table 6-8 of the *AMA Guides*. If anything, the 16 percent rating is a conservative number, because the ratings from Table 6-8 are for whole person impairment; Dr. Meyers did not provide any conversion to a regional impairment, which would result in a higher number.

The parties agreed that Claimant suffered 16 percent permanent impairment of his biliary tract in the accident, so Claimant is entitled to 48 weeks of benefits (300 weeks multiplied by 0.16) at the compensation rate of \$203.55 per week.

### ***Pelvis***

The Board has awarded permanency benefits for the pelvis in several previous cases; however, the maximum number of weeks assigned to the pelvis has varied. Claimant provided three IAB cases in which the Board reached different conclusions as to the “proper and equitable” number

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28, 2006.

<sup>4</sup> Although the parties did not make these specific comparisons, the biliary tract could also be compared to other organs that perform essential digestive functions for the human body, such as the bowel and the bladder, both of which have been found worthy of a 300 week maximum permanency rating for total loss of function. *See Birney v.*

of weeks for an unscheduled loss to the pelvis: A maximum loss of 150 weeks was assigned in *Ahumada v. Citi USA Incorporation*, IAB Hrg., No. 1281709 (Aug. 7, 2009). A maximum loss of 250 weeks was assigned in *Merrill v. City of Wilmington*, IAB Hrg., No. 1212936 (Oct. 11, 2005). A maximum loss of 300 weeks was assigned in *Lisa Berry v. Racer's Edge Stables*, IAB Hrg., No. 1199854 (June 7, 2004). The parties asked the Board to determine the appropriate maximum scale for total loss of use of the pelvis, with guidance from these previous decisions.

The rationales used in the above-captioned decisions were brief and varied. A maximum scale of 150 weeks was applied in *Ahumada* because “The pelvis is near in proximity, and works in tandem with, the lower extremity, which equals 250 weeks for permanent injury ... [but] does not perform the same function as the lower extremity.” *Ahumada*, Del. IAB, Hrg. No. 1281709 at 13. *Ahumada* further noted that the lower extremity includes the knee, ankle, and foot while the pelvis is singular, so 150 weeks was used as the maximum. *Merrill* applied a maximum scale of 250 weeks, stating, “The Board has previously treated the hip and pelvis as similar to a lower extremity, which is a scheduled loss in the amount of 250 weeks.” *Merrill*, Del. IAB, Hrg. No. 1212936 at 12. The Board in *Berry* simply stated, “Based on the function of the pelvis in relation to the entire body, the Board will use the maximum scale of 300 weeks for permanent injuries to the pelvis.” *Berry*, Del. IAB, Hrg. No. 1199854 at 10.

In addition to *Berry*, this Board is aware of at least one other more recent decision where the maximum scale of 300 weeks available under Section 2326(g) was used to rate permanent injury to the pelvis. In that decision, the Board noted, “The complete loss of use of the pelvis would have a greater effect on the whole person than a complete loss of a single leg, which would get 250 weeks, because the pelvis affects the use of both legs.” *Buckman v. Matrix Svcs*, Del. IAB, Hrg. No.

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*George Burns, Inc.*, Del. IAB, Hrg. No. 1258420, at 13 (July 10, 2006)



1342204 (June 14, 2012) (citing to *Berry v. Racer's Edge Stables, Inc.*, *supra*). The Board in *Buckman* also recognized the discrepancy with the decision in *Ahumada*, which had applied a 150-week maximum scale to the pelvis permanency rating. "The Board here believes the 300-week scale from *Berry* is more reasonable given the essential function of the pelvis to both lower extremities, which are each worth a maximum of 250 weeks." *Buckman*, Hrg. No. 1342204 at 40, note 6.

The Board first looks at the structure and function of the pelvis to help it determine the appropriate maximum scale to assign to the pelvis. The pelvis includes the two "hip" bones, each of which are divided into a pubis, ilium, and ischium. These two hip bones, or coxal bones, combine with the sacrum and coccyx at the bottom of the spine to form the pelvis and provide the connection between the bones of the lower limbs to the spine and axial skeleton. *See, e.g., Stedman's Medical Dictionary* 1318 (26<sup>th</sup> ed. 1995); David Shier, Jackie Butler, Ricki Lewis, *Hole's Human Anatomy & Physiology* 200, 227-231 (8th ed. 1999). As the Fifth Edition of the *AMA Guides* explains, "The pelvis, including the symphysis pubis, assists in transfer of body weight to the lower extremities," in addition to providing protection to lower abdominal and sexual organs. *AMA Guides* at 427. The femur from the lower extremity sits in the depression of the hip bone called the acetabulum to form the hip joint. Based on this structure and function, the Board views the pelvis as essential to the function of both lower extremities. All of the previous Board decisions cited recognized the functional relationship between the pelvis and the lower extremity in determining what maximum rating scale to use. In *Ahumada* and *Merrill*, however, the comparison was made only to *one* lower extremity, thus leading to the use of the maximum scales of 150 weeks and 250 weeks respectively. This does not fully account for the function of the pelvis, which is a singular body part that serves a crucial function to *both* lower extremities. As such, this Board concludes that, when determining the appropriate maximum scale for the pelvis, the more fair comparison would be to the maximum

weeks specified for permanent impairment of *both* lower extremities, which would be a total of 500 weeks (250 weeks for each limb). In this context, a maximum scale of 300 weeks for a pelvis permanency would be quite reasonable.

A maximum scale of 300 weeks for the pelvis would also be consistent with the Board's tradition of using a 300 week scale to rate lumbar spine permanencies. As noted earlier, the pelvis is partly formed by the bottom portions of the spine – the sacrum and the coccyx – which are adjacent to the lumbar spine. In fact, the *AMA Guides* include the pelvis in the chapter on the spine (Chapter 15), not the chapter on the lower extremities. This provides a strong rationale for viewing the pelvis as similar to the adjacent lumbar spine for the purposes of a permanency rating. The lumbar spine has traditionally been assigned a 300-week maximum by the Board, because an injury to the lumbar spine can affect both lower extremities. “If a single extremity is worth 250 weeks, then a body part that can affect both should be valued at more than 250 weeks.” *Birney v. George Burns, Inc.*, Del. IAB, Hrg. No. 1258420, at 13 (July 10, 2006) (calculating lumbar spine permanency based on a 300-week scale). The pelvis similarly affects both lower extremities if it is permanently injured and it therefore is reasonable to rate the pelvis on the same 300-week scale as the lumbar spine.

Based on the above discussion, the Board concludes that a 300-week maximum scale for the pelvis is reasonable in comparison to the 250-week maximum scale for loss of a single leg. The Board therefore finds that a 300-week maximum scale for permanent impairments to the pelvis would be “proper and equitable” for this unscheduled loss under Section 2326(g) of the Workers' Compensation Act.

The parties agreed that Claimant suffered 23 percent permanent impairment of his pelvis in the accident, so Claimant is entitled to 69 weeks of benefits (300 weeks multiplied by 0.23) at the compensation rate of \$203.55 per week.

## Attorney's Fee

A claimant who receives an award is entitled to 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 less. 19 *Del. C.* § 2320. At the current time, the maximum based on the average weekly wage calculates to \$9,911.90.

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). An award of less than the maximum fee is permissible and consideration of the *Cox* factors does not prevent the granting of 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). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

At the hearing, Claimant established that he is entitled to disfigurement benefits for various injuries that resulted from the acknowledged work accident. Claimant's counsel submitted an affidavit stating that she spent 5 hours preparing for the hearing regarding the disfigurements. Claimant also established that he is entitled to permanency benefits for the pelvis and the biliary tract based on a maximum scale of 300 weeks for each injury, resulting in permanency awards of 69 weeks and 48 weeks respectively. Counsel represented that Claimant is also entitled to permanency awards for eight other body parts based on a settlement reached the day before the hearing.

Counsel further represented that she was admitted to the Delaware bar in 2003 and has experience practicing in the area of Delaware workers' compensation law. Counsel's first contact with Claimant occurred on May 24, 2010. There is no evidence that counsel represented Claimant in anything other than a workers' compensation context. The case was more complex than usual

because of the multiple areas of injury and the presence of some novel permanency issues to present to the Board. There do not appear to have been any unusual time limitations imposed by either Claimant or the circumstances. There is no evidence that counsel was precluded from accepting other employment because of working on this case. The fee agreement attached to the affidavit shows that the fee agreement with Claimant is contingent on recovery. Counsel represents that she charges \$250 per hour for hourly work. There is no suggestion that the employer is incapable of paying an attorney's fee.

Taking into consideration the factors set forth above and the fees customarily charged in this locality for similar services, and in particular the significant benefits achieved on Claimant's behalf, the Board finds that an attorney's fee in the amount of \$9500 is reasonable in this case.

A medical witness fee for testimony on behalf of Claimant is awarded to Claimant, in accordance with title 19, section 2322(e) of the *Delaware Code*.

#### **STATEMENT OF THE DETERMINATION**

For the reasons set forth above, Claimant's Petition to Determine Disfigurement is GRANTED and Claimant is awarded benefits in the following amounts:

Right abdomen scar	25 weeks
Center abdomen scar	20 weeks
Horizontal low back scar	20 weeks
Neck tracheotomy scar	15 weeks
Low back scar, surgical	10 weeks
Right upper abdomen	4 weeks
Upper chest, portal scars	4 weeks (2 weeks for each scar)
Right lower extremity scars	43.7 weeks (adjusted using <i>Bagley</i> analysis)
(includes right shin scar, right knee scars, and right ankle scar)	
Altered gait	27.3 weeks (adjusted using <i>Bagley</i> analysis)


Furthermore, the Board grants Claimant's Petition to Determine Additional Compensation Due and finds that permanency awards for the biliary tract and the pelvis should be calculated using 300 weeks as the maximum for these unscheduled losses under Section 2326(g). This results in the award of the following permanency benefits, using the percentages agreed to by the parties:

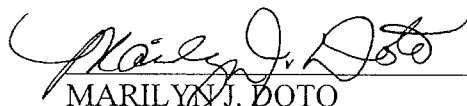
Thoracic spine/ribs	33 weeks
Lumbar spine	93 weeks
Pelvis	69 weeks
Left lower extremity	227.5 weeks
Right lower extremity	227.5 weeks
Bowel/anot-rectal	150 weeks
Bladder	120 weeks
Sexual function	180 weeks
Biliary tract	48 weeks
Abdominal wall	90 weeks

Compensation for disfigurement and permanency is to be paid at the rate of \$203.55 per week. Claimant is also awarded a reasonable attorney's fee of \$9500 and a medical witness fee.

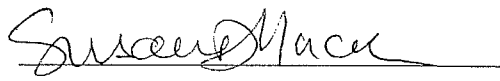

IT IS SO ORDERED THIS 1<sup>st</sup> DAY OF ~~JULY~~ <sup>AUGUST</sup>, 2013.

**INDUSTRIAL ACCIDENT BOARD**

  
\_\_\_\_\_  
LOWELL GROUNDLAND

  
\_\_\_\_\_  
MARILYN J. DOTO

I, Susan D. Mack, Board, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

  
\_\_\_\_\_  
  
\_\_\_\_\_  
OWC Staff

Mailed Date: 8-3-13

