

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

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JACQUELINE MIMS,)
)
Employee,)
)
v.) Hearing No. 1381015
)
SHERMS CATERING LLC,)
)
Employer.)

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 January 28, 2014, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

JOHN D. DANIELLO

MARILYN J. DOTO

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

APPEARANCES:

M. Jean Boyle, Attorney for the Employee

John J. Klusman, Jr., Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Jacqueline Mims (“Claimant”) was injured on March 5, 2012, while she was working for Sherms Catering LLC (“Employer”). She fell into hot cooking oil/grease, sustaining extensive burning, primarily to her torso, right upper extremity and right lower extremity. Extensive skin grafts were taken from both of her lower extremities as well. Claimant has received certain workers’ compensation benefits, including compensation for a 50% permanent impairment to the skin (150 weeks of compensation) and a 10% permanent impairment to the right upper extremity (25 weeks of compensation). Her compensation rate is \$232.89 per week, based on a weekly wage at the time of the injury of \$349.31.

Claimant filed a Petition to Determine Disfigurement on August 23, 2013. A hearing was held on this petition on January 28, 2014. This is the Board’s decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified that she is fifty-one years old. Prior to March of 2012, she would go to the beach, go swimming, do cooking and the like. On March 5, 2012, a coworker put hot oil into a bucket while cleaning out a deep fryer. Some oil was spilled on the floor. Claimant slipped on this oil and landed in the bucket. The hot oil burned her. She was first taken to Christiana Care and then was taken to Crozier-Chester Burn Center for about a month, where she received treatment including having skin grafts.

Claimant testified that her doctor has discussed performing reconstructive surgery on her breast and another procedure to the stomach.¹ However, she cannot have it done until she loses weight. She has been unable to do that. On the contrary, she has gained about thirty pounds.

¹ Claimant’s counsel explained that the stomach procedure would resemble a “tummy tuck” except that it is not being done for cosmetic purposes. The breast reconstruction would be directed to the nipples and areola—in other words, to parts that would not be visible when normally clothed. There was also discussion of a letter counsel wrote suggesting that there may be further surgery to the right arm, and bilateral flanks, thighs and legs. Claimant is unaware of any such surgery plans. She only knows about the breast reconstruction and the abdomen procedure.

She recently changed her diet (gave up meat) and has begun walking for exercise. She avoids going to the gym because people just stare at her all the time. She had also been advised to go to the beach for some sun and get some salt water on her skin. She went but, as usual, people stared at her and this made her uncomfortable so she put on her clothes again and went home.

Claimant stated that now she does not do much of anything. She stays in the house. She continues to receive pain management and psychiatric care. She takes an anti-depressant and she has a medication to help her sleep. She is depressed about how her body looks. Even she does not like to touch or look at her own skin like she used to do. She does not look into a mirror like she used to do. She cannot wear the clothes she used to wear. She now limits herself to wearing long sleeves because, otherwise, people will stare at her. She used to be very sociable but now she shies away from that. She does not want to be seen by others.

Claimant displayed her scarring to the Board. She was wearing a sports halter bra and the measurements are only of the visible scarring (*i.e.*, not covered by the bra). On her right upper extremity, there is an area that is texturized and has something of a mesh appearance. This marking runs down the arm for 15 inches and goes around the arm such that, up by her bicep, it is eleven to twelve inches wide. The coloring is mottled, being generally a dark brown color with pink spots. Nearer the armpit on the anterior part of the arm there is a 3 inch by 1 inch mark with the same sort of discoloration. Similarly, there is some mottling visible in the wrist and hand area. The right upper extremity also suffers from a contracture so that Claimant cannot completely straighten her arm. She can only straighten it about 75% to 80% of full.

In the upper chest area, there is a wide area of discoloration, with similar coloring as the arm (brown, pink, dark brown mottling), that measures seven inches down from the clavicle to the top of the sports bra, and for a width of eight inches across the upper chest. In addition, on

the right side, nearer Claimant's face, there is some lesser discoloration that could be described as a difference in shading.

Below the sports bra on the abdomen, on the right side, there is a similarly discolored mark that measures fifteen inches by six inches, down to where Claimant was wearing a swimsuit bottom.

On Claimant's left upper extremity, there are three or four marks.² They all share the same general discoloration as the other markings. The highest up the arm is 2 inches by three-quarters of an inch. There is then, further down the arm, a mark that is roughly 2 inches by 2 inches, which then adjoins another mark that is 2.5 inches by 1.5 inches. Further down the arm, there is another mark that is 1.5 inches by 1 inch. In addition, the left forearm to the wrist has some lesser mottling.

On Claimant's back, above the bra and around the level of the armpit, there is a mark with the same mottling pattern that is 5 inches by 3 inches. On the mid-back, there is a 2 inch by 1.5 inch mark. On the lower back, below the bra but above the waistline (as established by the swimsuit bottom) there is an area of the mottled discoloration that is 6 inches high and measures 8 inches long, wrapping around the torso to connect with the discoloration on the abdomen described above.

On Claimant's right lower extremity, on the front, there is an area of discoloration (with about the same coloring pattern as the other marks) that is 9.5 inches long. In terms of width, at the top of the leg (but under the swimsuit bottom) runs 9 inches and then goes down narrowing to 2.5 inches at the bottom. On the back of the right leg, the marking is slightly different. A skin

² As will be seen, there is one area that can be viewed as a single large mark, or as two smaller marks that adjoin. For ease of measurement and description, the Board describes them as two adjoining marks. However, because they adjoin, they can be viewed as a single large mark. Thus, Claimant either has three or four marks on her left arm, depending on how one categorizes this one area.

graft was taken from this area, so the texture of the marking is different and it looks more like strips of skin taken away. In terms of coloration it is a dark brownish mottled color. The area of these strips is 11 inches by 8 inches.

Similarly, on the left lower extremity, there is a large graft area that runs 8 inches down the upper leg. In terms of width, it basically wraps around the leg, but is measured at 21 inches.

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).

There are two preliminary issues that must be addressed before evaluating Claimant’s disfigurement. First, Employer questions whether the condition is in a fixed and permanent state because of the potential for future surgeries. With regards to the breast reconstruction surgery, the Board agrees with Claimant that that surgery would not, itself, be eligible for a disfigurement award because the area of the surgery would not be visible when she is normally clothed (*i.e.*, it would be covered by her bra). As such, there is no reason to refuse to assess her disfigurement claim for the markings she currently has that are visible when she is normally clothed. Another surgery has been proposed for the abdomen. It is not clear whether this surgery would change the disfigurement in any event, but more importantly there is serious doubt whether this surgery will ever be performed. Claimant was advised that she would need to lose weight in order to have it done and, instead, she has been gaining weight. The Board sees no point in delaying the disfigurement assessment on the basis of a mere potential surgery that may or may not happen at some indefinable point in the future. Finally, Employer states that, in a letter to Employer’s

counsel, Claimant's counsel recited other possible future surgeries for Claimant. Claimant, however, testified that she is unaware of any further planned procedures apart from the breast reconstruction and abdomen surgeries. Apart from this letter, Employer also has no knowledge of any planned procedures. Again, the Board finds these "surgeries" too vague to justify postponing the disfigurement assessment.

The second preliminary issue concerns how this disfigurement should be assessed. Employer argues that the statute provides for an award of "proper and equitable compensation for serious and permanent disfigurement to any part of the human body up to 150 weeks." DEL. CODE ANN. tit. 19, § 2326(f). Employer argues that the disfigurement is to Claimant's "skin" (for which she received a permanent impairment award) and, thus, Claimant's scarring over her body is only to one "body part" and thus the total award for the entire bodily scarring should be capped at 150 weeks.

The Board disagrees. The statute's reference to "part of the human body" should be read in the context of the section as a whole. While the subsection concerning disfigurement awards (and, curiously, permanent hearing loss) is subsection (f), the remainder of Section 2326 pertains to permanent impairment to parts of the body. The statute references specific body parts such as the hand, arm, foot, leg and the like, but there is no specific reference to skin. Provisions concerning these specifically mentioned body parts form the focus of subsections (a) thru (e) of Section 2326. It is not until subsection (g) that the section opens up to consideration of compensation "for the loss of *any* member or part of the body or loss of use of any member or part of the body." DEL. CODE ANN. tit. 19, § 2326(g) (emphasis added). However, this provision also goes on to state that no such compensation should be paid under subsection (g) for such other body parts when the loss or loss of use is for a body part or member "for which

compensation payments are already provided by the terms of this section.” DEL. CODE ANN. tit. 19, § 2326(g). From this, it is clear that the statute’s preference is for awards to first be evaluated in terms of the identified parts of the body listed in the section before broadening out to other non-listed body parts.

While these provisions deal with permanent impairment, the fact that the disfigurement provision is included in this same section (Section 2326) shows the legislature’s intent to view disfigurement awards as being similar to permanent impairment awards. Claimant’s disfigurement can easily be viewed as disfigurement to her right upper extremity, her left upper extremity, her right lower extremity and her left lower extremity, all of which are covered by the body parts (arms, legs) that the legislature specifically identified when writing Section 2326. As such, each of these body parts is eligible for a separate disfigurement award, with each capable of being rated on the standard 0 to 150 scale.

It is only with regard to the burn marks on Claimant’s torso that an argument might be made that the body part involved is the whole torso (which is not a listed body part in Section 2326), rather than being separately the “front” and “back.” On the other hand, it could also be argued that referring to a person’s “back” and “abdomen” are common references that would view the torso as being composed of separate body parts.³ The Board need not decided this issue at this time, because, as will be seen, the disfigurement award for Claimant’s whole torso will not exceed 150 weeks. In other words, the awards to Claimant’s front and back would remain the same whether grouped together as one “body part” or viewed as separate body parts.

This brings us to the actual evaluation. Factors that the Board should consider in determining the number of weeks of compensation are (a) the size, shape and location of the

³ Similarly, in making awards for permanent impairment, the Board has long viewed the spine as three separate parts: the lumbar, thoracic and cervical spine. They are medically distinct body parts.

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 sizes, shapes and locations of Claimant's scarring in the "Summary of the Evidence," and it incorporates that description here. The scarring is extensive. For organization purposes, it is easiest to discuss these by body part.

First, with respect to the right upper extremity, the scarring runs extensively down the arm, with additional marking near the armpit as well as at the wrist and hand area. The overall skin discoloration is significant and the mottling makes the discoloration even uglier. The right upper extremity scarring would be plainly visible when Claimant is normally clothed, such as when wearing a swimsuit. This scarring is clearly more significant than a simple, straight surgical scar. This is profoundly noticeable and substantial in size. Claimant also noted a slight contracture of the arm. While this contracture affects the loss of use of the arm (permanent impairment) it is a very minor factor in terms of disfigurement. It would take an extremely observant person to notice, in normal life, that Claimant was not able to completely straighten her arm. The Board does accept that Claimant's scarring causes her great social and psychological discomfort. Taking into account all these considerations and rating Claimant's

right upper extremity disfigurement on a scale from 0 to 150 weeks, the Board awards 80 weeks of benefits for Claimant's right upper extremity disfigurement.

By comparison, Claimant's left upper extremity is less severely disfigured. She has three or four markings (depending on how they are characterized). The central mark (which can be viewed as either one or two marks) is the most significant, but they are all of noticeable size and are readily observable to casual glance. The discoloration effect is similar to what has been described previously. The marks are ugly but not as extensive as on the right upper extremity. Similarly, these marks would have some social or psychological effect, but not as extensive as that caused by the more extensive marking on the other arm. Taking into account all these considerations and rating Claimant's left upper extremity disfigurement on a scale from 0 to 150 weeks, the Board awards 20 weeks of benefits for Claimant's left upper extremity disfigurement.

With regard to Claimant's right lower extremity, the scarring is on the upper leg, but visible below the line of a swimsuit bottom. Thus, it is in an area that would be readily visible when normally clothed. The appearance of the donor site on the leg is slightly different from the general burn marking elsewhere, but it is equally as ugly. The markings practically wrap around the upper leg and cover a substantial area of skin. It is not quite as extensive as the right upper extremity scarring, but it is close. As with all the other areas, it is credible that this disfigurement would had a significantly negative social and psychological effect. Taking into account all these considerations and rating Claimant's right lower extremity disfigurement on a scale from 0 to 150 weeks, the Board awards 50 weeks of benefits for Claimant's right lower extremity disfigurement.

With regard to Claimant's left lower extremity, once again you have scarring and discoloration on the upper leg that essentially wraps around the whole leg. The appearance is

highly similar to the right lower extremity, but is smaller in overall scale. The same social/psychological effect can be expected. Accordingly, the Board rates it similarly to the right lower extremity and on a scale from 0 to 150 weeks, the Board awards 40 weeks of benefits for Claimant's left lower extremity disfigurement.

This leaves the torso. On Claimant's upper back, there is a 5 inch by 3 inch mark and, on the mid-back, there is a 2 inch by 1.5 inch mark. The most significant area, however, is the lower back where the scarring is about 6 inches wide and wraps around the back to the front. On the back alone it is 8 inches long. On Claimant's front, the abdomen area is scarred in an area 15 inches by 6 inches. On the upper chest, there is another area that measures 7 inches by 8 inches. There is also a shading difference that goes up toward the right side of the face. Compared to the rest of the scarring this shading difference is mild, but the face is, if anything, a more prominent area of the anatomy than the torso, which could more easily be covered. The other areas are of the same general discoloration described earlier. Once again, this torso disfigurement would reasonably cause serious social and psychological discomfort. It is an ugly disfigurement. On a scale from 0 to 150 weeks, for the back alone the Board would award 30 weeks of benefits. For the abdomen, the Board would award another 30 weeks. For the upper chest and face, the Board would award 20 weeks. Thus, for the entire torso evaluated as a single body part, the Board would award a total of 80 weeks of benefits.

In summary, then, on the standard 0 to 150 scale, the Board would award 60 weeks for the right upper extremity; 20 weeks for the left upper extremity; 50 weeks for the right lower extremity; 40 weeks for the left lower extremity; and 80 weeks for the torso (with a touch of face). The entire disfigurement award would therefore be 250 weeks of compensation.

Bagley Analysis

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).

Claimant has received compensation for permanent impairment to her right upper extremity (10% or 25 weeks of compensation) and the skin (50% or 150 weeks of compensation). When two permanent impairments overlap, the Board has previously held that the impairments need to be combined for purposes of the *Bagley* analysis. *See Banning v. UPS*, Del. IAB, Hearing No. 1310800, at 5-6 (November 14, 2013). Following this, the *Bagley* scale for the right upper extremity starts with 150 weeks for skin plus 25 weeks for the right upper extremity. This is a total of 175 weeks. We then add 20% (35 weeks) to make the *Bagley* scale for the right upper extremity go from 0 to 210 weeks. This is obviously larger than the normal 0 to 150 week scale. On the normal scale, the Board awarded 60 weeks of compensation for the surgical scar. This is 40% of the scale. The scar has not changed just because a different scale is being used. The Board would still award 40% of scale on the larger 0 to 210 scale. Accordingly, under the larger *Bagley* scale, the Board would award 84 weeks of compensation for the right upper extremity.

With regard to the remaining body parts, the only applicable impairment is the skin impairment (150 weeks). Adding 20% (30 weeks) makes the applicable *Bagley* scale from 0 to

180. This is also larger than the normal 150-week scale. Using the same percentage-of-scale approach described above, under the larger 180-week scale the Board would award 24 weeks for the left upper extremity (about 13.333% of scale); 60 weeks for the right lower extremity (one-third of scale); 48 weeks for the left lower extremity (about 26.666% of scale); and 96 weeks for the torso & face (about 53.333% of scale)(36 weeks for the back, 36 weeks for the abdomen/front and 24 weeks for the upper chest/face).

Using the applicable *Bagley* scales, therefore, the Board would award a total of 312 weeks of compensation for Claimant's total disfigurement.

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 \$9,911.90.

Attorney's fees are not awarded if, thirty days prior to the hearing date, the employer gives a written settlement offer to the claimant that is "equal to or greater than the amount ultimately awarded by the Board." DEL. CODE ANN. tit. 19, § 2320. In this case, Employer did make a written settlement offer more than thirty days prior to the hearing and that offer was for less than the Board's award. Accordingly, an award of attorney's fees is appropriate.

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 a total of 312 weeks of compensation. At Claimant’s compensation rate, that equates to a total award of \$72,661.68 for Claimant’s disfigurement related to the work accident. Claimant’s counsel submitted an affidavit stating that 8 hours were spent preparing for the hearing. The hearing itself lasted slightly over an hour. Both the preparation time and the hearing time are longer than usual for a disfigurement claim because Claimant’s disfigurement itself is unusual. Claimant’s counsel was admitted to the Delaware Bar in 2002 and she has experience in workers’ compensation litigation. Counsel’s initial contact with Claimant was in April of 2012, so the period of representation has been for well in excess of a year and a half. Like most disfigurement hearings, this case was factually basic involving little more than asking a few simple questions of Claimant and displaying the disfigurement to the Board. It did involve unusual issues concerning ripeness and the legal interpretation of the statutory phrase “part of the human body.” It required average 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, although naturally she could not work on other matters at the same time as she was working on this one. There is no evidence that counsel was actually

precluded from accepting other employment because of her representation of Claimant, although naturally she would not have been able to represent the employer or insurance carrier if any such offer of employment had been made. Counsel's fee arrangement with Claimant is on a contingency basis, but she notes that her normal hourly rate would be \$300. 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.

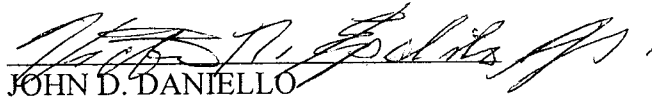
Taking into consideration the fees customarily charged in this locality for a disfigurement claim, the services that were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of \$2,700 is proper and reasonable in this case and does not exceed thirty percent of the value of the award. The fee calculates out to being roughly \$300.00 per hour for counsel's services, which is more than adequate for a disfigurement claim.

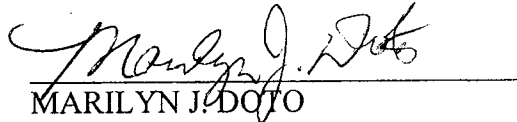
STATEMENT OF THE DETERMINATION

For the reasons stated, the Board awards Claimant a total of 312 weeks of compensation for Claimant's disfigurement related to her extensive burn injury. Claimant is also awarded an attorney's fee.

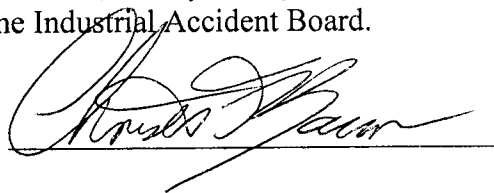
IT IS SO ORDERED THIS 12th DAY OF FEBRUARY, 2014.

INDUSTRIAL ACCIDENT BOARD

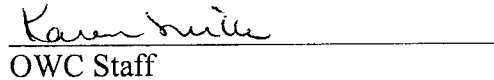

JOHN D. DANIELLO


MARILYN J. DOTO

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


Christopher F. Baum

Mailed Date: 2-17-14


Karen Miller
OWC Staff