

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

RANDALL DAVIS, )  
 )  
 Employee, )  
 )  
 v. )  
 )  
 PERDUE, )  
 )  
 Employer. )

Hearing No. 1127521

*187.5 weeks per  
leg awarded  
for disfigmt*

**DECISION ON PETITION FOR DISFIGUREMENT BENEFITS**

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 August 18, 2010, in the Hearing Room of the Board, in Milford, Delaware.

**PRESENT:**

VICTOR EPOLITO JR.

MARY DANTZLER

Angela M. Fowler, Workers' Compensation Hearing Officer, for the Board

**APPEARANCES:**

Andrea Green, Attorney for the Employee

Anthony Frabizzio, Attorney for the Employer

### SUMMARY OF THE EVIDENCE

Claimant testified that he is currently 48 years old. On February 5, 1998 he was working for Employer when he fell, sustaining serious injury to his neck. This injury ultimately resulted in a neck surgery wherein bone was grafted into Claimant's neck from his left hip.

Claimant displayed his injuries for the Board. Claimant initially demonstrated the disfigurement to his legs and gait by walking up before the Board. In doing so, the Board noted the bent appearance of Claimant's legs as he attempted to stand from a seated position and then walk. When moving, Claimant's feet were noted to be turned in, dragging the ground as his legs remained bent. In addition to the obvious physical deformities associated his legs and Claimant's inability to straighten them, the Board observed that Claimant's overall gait was severely awkward and abnormal requiring the use of a walker to ambulate at all. Claimant could only move at a slow and unsteady pace highlighting the appearance of deformity in his lower extremities.

Moving beyond consideration of Claimant's lower extremity deformities, the Board observed a scar on the front of Claimant's neck resulting from his cervical grafting surgery. The scar is approximately 3 1/2 inches long and slightly discolored. The Board also observed the scar on Claimant's left hip from which the bone was taken for the cervical graft as being approximately 2 1/4 inches in length, slightly discolored and raised from the surface of Claimant's skin.

Claimant testified that he has been greatly affected by his work related disfigurement. Claimant indicated that his injuries are obvious, highly visible and conspicuous all of the time. According to Claimant people ask about his scars and inability to walk causing him tremendous discomfort. Claimant testified that he was an active, physically fit individual before his

### **Neck & Hip Scars**

As an initial matter, the Board accepts that the two scars (one on Claimant's neck and the other on his hip) have a distinct social/psychological impact on Claimant. He testified that these scars elicit questions from people regarding what happened to him causing him discomfort. While the scars on Claimant's neck and hip are disfiguring, however, they are obviously not as severe a disfigurement as, for example, a burn scar or amputation would be. The scar on Claimant's neck (in particular and more so than the one on his hip) is prominently displayed and conspicuous most of the time. Despite its somewhat altered coloration, however, it is a relatively clean appearing surgical incision. The scar on Claimant's hip is more discolored and slightly raised but in a far less conspicuous location.

Taking all these factors into consideration and rating Claimant's disfigurement on a scale from 0 to 150 weeks, the Board awards Claimant 8 weeks of benefits for the scarring on his neck and 4 weeks of benefits for the scarring on his hip.

### **Lower Extremities**

The condition and appearance of Claimant's legs evidence a much more serious consideration for the Board. Given the severity of the injury to his legs, the Board has no doubt that Claimant suffers a distinct social and psychological impact from this disfigurement. The Board accepts Claimant's testimony that he was an active man prior to his industrial accident and is persuaded by Claimant's testimony of the difficulty that people around him have in seeing him in such a limited capacity now, post-accident. While the disfigurement to his legs clearly falls short of a total loss such as is the case in an amputation, Claimant's disfigurement and altered gait come very close to the amputation extreme. Certainly in comparing Claimant's altered gait

award of 75% permanent impairment to each of his legs. Applying the *Bagley* formula in this case results in the second scale being from 0 to 225 weeks (187.5 weeks or 75% permanent impairment plus twenty percent, i.e., 37.5 weeks). Under this expanded scale, considering the same factors set forth above, the Board would award Claimant 187.5 weeks of benefits per leg. Because the 187.5 weeks calculated on the larger 0 to 225 scale is higher, that is what Claimant is awarded.

### **Rate of Compensation**

Claimant has argued that while his average weekly wage at the time of his injury was \$264 he should be entitled to compensation at the rate of \$203.55. Employer opposes the \$203.55 rate arguing that Claimant offered no evidence of when his injury became fixed, otherwise allowing for a higher minimum compensation rate than what was in place at the time of his injury. The Board agrees with Employer that Claimant offered no evidence of when the disfigurement became fixed and therefore finds no basis upon which to set Claimant's compensation rate at \$203.55. Instead the Board is satisfied that Claimant is entitled to a compensation rate equal to  $66 \frac{2}{3}$  of his average weekly wages at the time of his injury or \$176 per week.

### **Attorney's Fee**

A claimant who is awarded compensation is generally 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. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of \$2,200.00 is reasonable in this case.

**STATEMENT OF THE DETERMINATION**

For the reasons stated, the Board awards Claimant 8 weeks of benefits for the scar on his neck, 4 weeks of benefits for the scar on his hip and 187.5 weeks of benefits for each lower extremity disfigurement as well as \$2,200.00 in attorney's fees.

IT IS SO ORDERED THIS 25 DAY OF AUGUST, 2010.

**INDUSTRIAL ACCIDENT BOARD**

  
VICTOR EPOLITO JR.

  
MARY DANTZLER

I, Angela M. Fowler, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.



Mailed Date:

8/27/10

  
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OWC Staff