

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

THOMAS KEE,)
)
 Employee,)
)
 v.)
)
 S.I.P. OF DELAWARE,)
)
 Employer.)

Hearing No. 1240275

*Claimant awarded
375 weeks disfigurement
for amputation
of 6 fingers*

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 a Workers' Compensation Hearing Officer by stipulation of the parties on October 28, 2004, in the Hearing Room of the Industrial Accident Board, in New Castle County, Delaware.

PRESENT:

KRISTOPHER T. STARR, ESQUIRE
Workers' Compensation Hearing Officer

APPEARANCES:

Joseph Weik, Attorney for the Employee

Jessica Julian, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Thomas Kee ("Claimant") suffered an amputation injury to multiple fingers of both his hands as a result of an October 2003 work accident. At the time of his accident, Claimant worked for SIP of Delaware ("SIP"). Pursuant to an agreement of the parties, Claimant's compensation rate for any disfigurement is \$389.00 per week based on an average weekly wage of \$583.50. On his left hand, Claimant previously received compensation for 100% impairment to his index finger, 100% to his second finger, 68% impairment to his ring finger and 48% to his little finger. On his right hand, Claimant previously received 100% impairment for all four fingers. Impairment to Claimant's left hand is calculated at 144 weeks. Impairment to his right hand is calculated at 168 weeks.

On March 23, 2004, Claimant filed a Petition to Determine Disfigurement seeking compensation for amputations to multiple fingers on both hands. This matter came before me on October 28, 2004. What follows is my decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. John Detweiler testified on behalf of Claimant. Dr. Detweiler, a clinical psychologist, examined Claimant first in September 2004. Claimant has significant emotional disturbance related to his work accident. The doctor diagnosed Claimant with post-traumatic stress disorder (PTSD) and adjustment disorder. He opined that Claimant is withdrawn and has serious psychological injuries related to his work accident. Claimant keeps his hands covered and has anxiety which affects his ability to interact with others.

On cross-examination, Dr. Detweiler admitted that his treatment is aimed at returning Claimant to work as well as treating his psychological injuries. Although he has not seen

Claimant on a weekly basis, he recommends Claimant undergo weekly therapy sessions. Claimant was placed on anti-depressant medication by his family doctor.

Claimant testified on his own behalf. He does not want to interact with people and attempts to hide his hands. He receives a lot of questions about his amputations. This bothers Claimant. He cannot take care of his family or his two children.

Claimant's amputations are not easily measured. He has lost all four fingers on his right hand and two fingers on his left hand. The remaining two fingers of his left hand are deformed.

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., slip op. at 7 (November 8, 1999).

The Hearing Officer fully described the size, shape and location of the amputations in the Summary of Evidence, and incorporates that description here. The amputations are significant in nature. They are blatant in appearance, and can be perceived at once on observation because of

their location and the extent of the injury. The amputations occurred to the fingers, which render them immediately visible. From Claimant's testimony, the injuries result in social and emotional distress, as Claimant constantly tries to hide his hands and avoids social situations. These amputations constitute serious disfigurements. Therefore, taking these considerations into account and rating Claimant's disfigurement on a scale from 0 to 150 weeks, I award Claimant 150 weeks of benefits for each hand or 300 weeks total.

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). In this case, Claimant received 144 weeks of compensation for permanent impairment to the fingers of his left hand and 168 weeks of impairment for the fingers of his right hand. Applying the *Bagley* formula in this case results in the second scale being from 0 to 173 weeks (144 weeks of permanent impairment plus twenty percent, *i.e.*, 29 weeks) for the left hand and 0 to 202 weeks (168 weeks of permanent impairment plus twenty percent, *i.e.*, 34 weeks) for the right hand. Under this scale, considering the factors set forth above, I would still award the maximum benefits. Because the 173 and 202 weeks calculated on the second scales are higher, that is what Claimant is awarded.

Medical Witness and Attorney's Fee

Medical witness fees for testimony on behalf of Claimant are awarded to Claimant, pursuant to 19 *Del.C.* § 2322 (e).

Pursuant to title 19, section 2320(g)(1) of the Delaware Code, a claimant awarded compensation is entitled to payment of a reasonable attorney's fee in an amount not to exceed 30% of the award or \$7,857.50, 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 I award such fees. I reviewed the request and find that the affidavit complies with the factors established in *Cox*. Accordingly, I conclude that Claimant is entitled to his attorney's fees taxed as a cost against the SIP based on the factors set forth in *Cox*. The 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).

Pursuant to the factors listed in *Cox*, I find as follows. Claimant's counsel submitted an affidavit reciting that he spent over sixteen hours in preparation for the hearing. The hearing lasted an hour. The affidavit lists October 2003 as the initial contact date with Claimant. The issue in this case was of average complexity. Claimant's counsel was not effectively precluded from accepting other employment because of this case. Any recovered fee is contingent and no time limitation appears to have been imposed by either Claimant or the circumstances. Counsel charged a contingency fee in this matter.

I find that SIP can afford to pay an award. Claimant's counsel has not received and does not expect to receive compensation from any other source.


Claimant's counsel has been a member of the Delaware Bar for twenty-five years. Claimant received a benefit in this matter because of his counsel's efforts in that he will receive disfigurement benefits. Taking into account these factors, and the fees customarily charged in this area, I find that an attorney's fee of the maximum allowed by statute is appropriate for counsel's services in this case.

STATEMENT OF THE DETERMINATION

For the reasons stated, I award Claimant 375 weeks of compensation for his amputations at the compensation rate of \$389.00 per week. I award a medical witness and an attorney's fee as well.

IT IS SO ORDERED THIS 10th DAY OF NOVEMBER, 2004.

INDUSTRIAL ACCIDENT BOARD



KRISTOPHER T. STARR, ESQUIRE
Workers' Compensation Hearing Officer

Mailed Date: 11-15-2004

MR
OWC Staff