

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

STANLEY OSTROWSKI,	:	
	:	C.A. No. 03A-02-010 WLW
Claimant Below-	:	
Appellant,	:	
	:	
v.	:	
	:	
YELLOW TRANSPORTATION,	:	
INC.,	:	
Employer Below-	:	
Appellee.	:	

Submitted: June 19, 2003  
Decided: September 24, 2003

**ORDER**

Upon Appeal from Decision of Industrial  
Accident Board. Denied.

Walt F. Schmittinger, Esquire of Schmittinger and Rodriguez, P.A., Dover,  
Delaware, attorneys for the Claimant Below - Appellant.

Thomas Gerard, Esquire of Marshall Dennehey Warner Coleman & Goggin,  
Wilmington, Delaware, attorneys for the Employer Below - Appellee.

WITHAM, J.

### **Introduction**

Before this Court is an appeal from an Industrial Accident Board (“IAB” or “the Board”) decision awarding Stanley Ostrowski sixty-two and one-half weeks (twenty-five percent of two hundred fifty weeks) of benefits for his permanent loss of sexual function resulting from a work-related accident. After reviewing the parties’ briefs, the IAB’s opinion and the transcript, it appears to this Court that the IAB’s decision should be *sustained*.

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### **Background**

#### ***Facts***

\_\_\_\_\_The parties do not dispute the facts as determined by the IAB. Stanley Ostrowski had been employed by Yellow Transportation, Inc. (YTI) as a truck driver for 32 years. On October 28, 1999, he sustained a back injury while lifting a box of books during the course of his employment. Almost two years after the accident, Mr. Ostrowski underwent back surgery. He was able to return to work 6 months after the surgery, but continued to have pain in his back and to suffer from a loss of sexual function. The award made by the IAB for his back injury is not in dispute here. Because of his embarrassment regarding the loss of sexual function, Mr. Ostrowski did not discuss his sexual dysfunction with any of his physicians until June 2002 when Dr. Rodgers asked him about the condition. After ruling out side-effects from medications as the cause of the dysfunction, Mr. Ostrowski’s doctors concluded that it was a result of the back surgery.

#### ***IAB’s Decision***

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The IAB concluded that Mr. Ostrowski's loss of sexual function was the result of the surgery, rather than a side effect of medication he was taking or an age related condition. As a result, the Board concluded that Mr. Ostrowski suffered a 25% permanent loss of sexual function as a result of the industrial accident and determined that the maximum recovery for the loss of sexual function is 250 weeks. Therefore, the IAB awarded Mr. Ostrowski sixty-two and a half weeks of benefits for his loss of sexual function.

In reaching its decision, the IAB concluded that the loss of sexual function is an unscheduled loss and therefore the maximum recovery available would be 300 weeks of compensation.<sup>1</sup> However, the statute does not permit the IAB to simply award 300 weeks of compensation for every unscheduled loss, they must instead evaluate each loss individually. Relying on their previous decisions, the IAB concluded that while the penis has two functions, one sexual and one as a urinary conduit, the sexual function is more important. The Board compared the loss of sexual function to the loss of an arm or a leg and made the award the equivalent of the loss of such a limb, 250 weeks of compensation.

Mr. Ostrowski filed this appeal with the Superior Court on May 5, 2003, seeking a modification of the Board's award, contending that an award of 250 weeks of compensation for the loss of sexual function was inadequate based on previous decisions of the IAB.

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<sup>1</sup> Del. Code Ann. tit. 28, § 2326(g) (1995).

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***Issue***

The issue before this Court is whether the Board erred as a matter of law in awarding Mr. Ostrowski benefits based on a maximum allowed compensation of 250 weeks, rather than a maximum of 300 weeks.

**Analysis**

***Appellant's Argument***

Mr. Ostrowski asserts that the IAB improperly applied 19 Del. C. § 2326(g), which states:

The Board shall award proper and equitable compensation for the loss of any member or part of the body or loss of use of any member or part of the body up to 300 weeks which shall be paid at the rate of 66 2/3 percent of wages, but no compensation shall be awarded when such loss was caused by the loss of or the loss of use of a member of the body for which compensation payments are already provided by the terms of this section.<sup>2</sup>

His argument rests on previous decisions by the Board, including *State of Delaware v. Kelly*<sup>3</sup> and *Gillespie v. Milford Fertilizer Co.*<sup>4</sup> In *Kelly*, this Court upheld an IAB decision awarding Mr. Kelly 300 weeks of compensation for the loss of sexual function and 300 weeks of compensation for the loss of bladder function following a helicopter accident. In reaching its decision, the Board determined that such

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<sup>2</sup> Del. Code Ann. tit. 28, § 2326(g)(1995).

<sup>3</sup> 567 A.2d 423 (Del. Super. Ct. 1989).

<sup>4</sup> IAB Hearing No. 888764 (December 14, 1992).

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losses were greater losses than the loss of an arm or a leg. The State of Delaware, as Mr. Kelly's employer, argued that the Board erred in awarding the maximum amount, alleging that the Board automatically awarded 300 weeks of compensation rather than considering the facts available. In its analysis, the Court concluded that because the Board demonstrated sufficient evidence as to why they made the award, the decision of the Board was upheld. It is important to note that the Court did not rule that 300 weeks of compensation was the only proper award for this loss, but merely that in this particular case the award was proper given the reasoning of the Board.

In *Gillespie v. Milford Fertilizer Co.*,<sup>5</sup> Mr. Gillespie was rendered a quadriplegic after he fell and broke his neck while using crutches as he was recovering from an industrial accident. The Board concluded that although previous Board decisions had determined the loss of bladder function and the loss of sexual function to be worth 150 weeks, they believed 300 weeks for each function to be more in line with the type of losses suffered by Mr. Gillespie. In reaching this decision, the Board stated that the loss of each of these functions is more important than the loss of a leg, which is scheduled at 250 weeks.

Finally, Mr. Ostrowski compares the Board's decision in *Moor v. Hercules, Inc.*,<sup>6</sup> in which the Board concluded that an injury to the abdominal wall was valued

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<sup>5</sup> *Id.*

<sup>6</sup> IAB Hearing No. 969398 (April 24, 1996).

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at 300 weeks because the abdominal wall is necessary to life, to the present case, arguing that sexual function is necessary to procreate and therefore necessary for life.<sup>7</sup>

***Appellee's Argument***

Yellow Transportation asserts that the Board's decision was correct in that it properly awarded 250 weeks of compensation to Mr. Ostrowski for his loss of sexual function. YTI reasons that because the penis has two functions, and Mr. Ostrowski has an impairment of only one function, 300 weeks of compensation would be too great. In support of their argument, YTI relies on several decisions of the IAB, including *McDougall v. Air Products & Chemicals, Inc.*<sup>8</sup> In *McDougall*, this Court upheld the IAB's decision to base their award for loss of sexual function on a maximum of 250 weeks, despite other decisions awarding up to 300 weeks. This Court concluded that the loss of use of both functions of the penis (sexual and urinary) would permit a maximum award of 300 weeks, but the loss of only the sexual function warrants a maximum award of 250 weeks.

In addition, YTI relies on a decision by the IAB using a method of analysis that this Court rejected in *Adams v. Perdue Farms, Inc.*<sup>9</sup> The decision relied upon

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<sup>7</sup> In addition, Mr. Ostrowski makes a statement in his brief that the Board's decision is a violation of Equal Protection, but fails to provide any support for this contention. Therefore, this Court will not consider this particular allegation.

<sup>8</sup> 2003 Del. Super. LEXIS 201.

<sup>9</sup> 1993 Del. Super. LEXIS 14.

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was *Figaro v. Brandywine Country Club*,<sup>10</sup> in which the IAB awarded Mr. Figaro compensation of 150 weeks for his loss of sexual function. The basis for making this award was based on the idea that the total loss of a penis would require compensation for 300 weeks, thus, the Board reasoned, loss of one function of the penis would require compensation for 150 weeks. The Court in *Adams* did not find legal error in a similar award of 150 weeks for loss of sexual function, but was more concerned with the Board arbitrarily dividing the penis into two equal functions. Thus this Court remanded the decision for a proper determination of the number of weeks for which compensation should be awarded, rather than permitting the Board to assign a random classification.

***Standard of Review***

\_\_\_\_\_ On appeal from the IAB, the role of the Superior Court is to determine whether there was substantial competent evidence to support the finding of the Board.<sup>11</sup> The Court is not the trier of fact and does not have the authority to weigh the evidence or make its own factual findings.<sup>12</sup> This Court determines if the evidence is legally adequate to support the Board's factual findings. However, when the issue raised on appeal is exclusively a question of the proper application of the law, as in this case, the review by this Court is *de novo*.

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<sup>10</sup> IAB Hearing No. 581861 (July 24, 1986).

<sup>11</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

<sup>12</sup> *Id* at 66.

***Discussion***

The Board concluded that Mr. Ostrowski suffered from a 25% loss of sexual function, relying on Mr. Ostrowski's testimony and the medical testimony presented by Mr. Ostrowski. This determination is not disputed by either party. In determining the proper compensation award for Mr. Ostrowski, the Board concluded that the loss of sexual function is the equivalent of losing an arm or a leg. Therefore the Board made the award based on the scheduled award for a lost arm or leg; 250 weeks. In addition, the Board relied on their previous decisions which concluded that the total loss of a penis would be valued at 300 weeks, but because the penis has two functions, the more important being the sexual function, the loss of sexual function would be worth 250 weeks.<sup>13</sup>

The decision of the IAB is in line with the recent decision by this Court in *McDougall*,<sup>14</sup> which affirmed a decision of the IAB to award a maximum 250 weeks compensation for a similar loss of function. In *McDougall*, this Court declined to follow *Kelly* and *Gillespie*, upon which Appellant here relies.<sup>15</sup> Prior to the decision in *McDougall*, the IAB had already abandoned the *Kelly/Gillespie* type of analysis adopting instead the idea of the sexual function being the more important of the two

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<sup>13</sup> See *Lejeune v. Citisteel USA, Inc.*, IAB No. 987311 (January 20, 1998) and *Lafferty v. James River Corp.*, IAB No. 943272 (November 16, 1995).

<sup>14</sup> 2003 Del. Super. LEXIS 201 at \*12.

<sup>15</sup> *Id.* at \*11.



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functions, and thus worth a maximum of 250 weeks.<sup>16</sup> Only total loss of use of the penis, including sexual and urinary functions, would result in an award of 300 weeks.

Based on the above reasoning, the decision of the Industrial Accident Board is affirmed and the Appellant's appeal is ***denied***. Appellant's request for attorneys' fees and costs for this appeal is also ***denied***.

IT IS SO ORDERED.

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J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

File

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<sup>16</sup> *Id.* at \*10.