BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

R & J CONSTRUCTION INC.,	)	
	)	
Employer,	)	
	)	
v.	)	Hearing No.: 1448295
	)	
JESUS VIDAL REYES,	)	
	)	
Employee.	)	

DECISION ON PETITION FOR COMMUTATION OF BENEFITS WITH REQUEST FOR LEAVE OF THE BOARD UNDER 19 DEL. C. § 2359

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause, by stipulation of the parties, came before a Workers' Compensation Hearing Officer on April 27, 2018 in a Hearing Room of the Board in New Castle County, Delaware.

PRESENT:

CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

APPEARANCES:

Matthew Fogg, Attorney for the Employee

Joseph Andrews, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On October 25, 2016 Jesus Vidal Reyes ("Claimant") was working for J & R Construction Inc. ("Employer") when he sustained injuries to his neck, ribs, bilateral arms, bowel, bladder, right leg, low back, head, gallbladder, digestive tract and pulmonary system. The parties then entered into a compensation Agreement through which they stipulated to an average weekly wage of $400.00 and a corresponding compensation rate of $266.66 per week.

On December 15, 2017 Employer filed a Petition for Commutation of all future installments of compensation after being discounted to present value. Employer further seeks leave of the Board under 19 *Del. C.* § 2359 to put this in an account with National Indemnity Co. ("NICO") to administer on Claimant's behalf.[1] If granted, Employer's payment "shall operate as a satisfaction of the award."[2] Thereafter, this sum, together with all interest arising from its investment, shall be held for Claimant "who shall have no further recourse against the employer."[3] Future payments shall then be made by NICO in the same amounts and periods as would have been required of Employer by this or future Board orders.[4] Finally, "if, after liability has ceased, any balance of the fund remains, it shall be returned to the employer who deposited it, on a signed order of the Board."[5]

A hearing was held on Employer's petition on April 27, 2018. The parties stipulated that this could be heard and decided by a Workers' Compensation Hearing Officer.[6] When hearing a case by stipulation, the Hearing Officer stands in the position of the Industrial Accident Board.[7] This is the decision on the merits.

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1 Employer's counsel provided legal research, which indicates that the Board has neither granted nor been asked to grant leave under 19 *Del. C.* § 2359 in quite some time. See, *Gunner v. Draper*, No. 24282 (Del. I.A.B. Nov. 16, 1922).

2 19 *Del. C.* § 2359(b).

3 19 *Del. C.* § 2359(a).

4 19 *Del. C.* § 2359(c). 19 *Del. C.* § 2360 allows the Board to modify the period for payments for the welfare of the Employee or the convenience of the Employer.

5 19 *Del. C.* § 2359(c).

6 19 *Del. C.* § 2301B(a)(4). In such cases, the Hearing Officer's decision has the same authority as a decision of the Industrial Accident Board itself.

7 19 *Del. C.* § 2301B(a)(6).

SUMMARY OF THE EVIDENCE

On October 25, 2016 Claimant was installing siding at a construction site for Employer. After a walk board on which he was standing gave way, Claimant fell multiple stories to the ground and sustained severe injuries. Shortly thereafter, the parties entered into a compensation Agreement approved by the Board, the terms of said Agreement being as follows:[8]

> That the said Jesus Vidal Reyes shall receive compensation at the rate of $266.66 per week based on an average weekly wage of $400.00 and that said compensation shall be payable weekly from the 19th day of December, A.D. 2016 until terminated in accordance with the provisions of the Workers' Compensation Law of Delaware.

It is undisputed that Employer has, at all times, continued to pay compensation and all medical expenses pursuant to this Agreement. Employer also paid for Claimant to have in-patient treatment with Magee Rehabilitation ("Magee") from November 11, 2016 through December 15, 2016. Thereafter, Employer agreed to pay for Claimant to live at the Windsor Suites in Philadelphia, Pennsylvania. Pursuant to the parties' Agreement, these hotel accommodations would be medically necessary for as long as Claimant continued out-patient therapy with Magee.[9]

The basis for the current petition arose when Magee fully discharged Claimant on December 15, 2017. Legally, Employer had no further duty to provide hotel accommodations as of that date because they were no longer medically necessary. Despite this, Claimant continued to stay in the hotel because his low compensation rate, when coupled with his lack of savings, has made finding his own accommodations very difficult. This hotel is not cheap: It has cost Employer $1,033.30 per week. As such, Employer has paid an additional $19,777.36 from December 15, 2017 to the date of this hearing. At Claimant's compensation rate, this equates to Employer having paid 74 additional weeks of compensation above what the law requires.[10]

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[8] Employer's Exhibit 1.

[9] Employer also offered to provide Claimant with in-house nursing care; however, Claimant declined such and all parties agree that he ultimately recovered beyond initial expectations so that nursing is unnecessary in this case.

[10] Per 19 *Del. C.* § 2304, Employer is only liable to pay compensation "to the exclusion of all other rights and remedies."

While it now has no legal duty to provide hotel accommodations, Employer argues it cannot simply "cut him off." Doing so, with permanent disability attributable to the accident and no place to live, could very likely lead to greater injury for which Employer could then face increased liability. Employer argues that this confluence of factors is a no-win scenario; imprisoning *both* parties and qualifying as undue hardship and expense. With no end in sight, Employer sought a solution to provide for Claimant and simultaneously decrease its own undue hardship and expense.

Recent decisions of the Industrial Accident Board were of little help; however, research by Employer's counsel discovered that the Board used to address situations almost identical to its own in older decisions involving contested commutations. When it saw no movement by Claimant, Employer relied on those decisions and had him evaluated by multiple experts to determine the true nature and extent of his permanent partial disability and future medical care.[11] Then, on the same day that Magee fully discharged Claimant, Employer filed a contested petition to commute permanent partial disability in a lump sum after being discounted to present value.

Initially, Employer's petition was intended to give Claimant enough money to provide for his own accommodations, terminate the stay at the hotel and simultaneously give Employer credit for the permanent partial disability compensation paid. As the hearing approached, Claimant informed Employer that he intended to relocate to Mexico and no longer wanted to purchase a home in the United States of America. Employer then amended the petition to include all future installments of total disability, serious and permanent disfigurement and medical treatment.[12] Claimant's counsel then informed Employer's counsel that the burden on his client to administer such a lump sum on his own would be detrimental due to his lack of financial experience. Therefore, Employer further amended the petition to seek leave of the Board via 19 *Del. C.* § 2359

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[11] E.g., *State Highway Dep't v. King*, No. 32350 (Del. I.A.B. Dec. 13, 1924); *Mannering v. Garis*, No. 101079 (Del. I.A.B. Dec. 15, 1936); *Worth Steel Co. v. Oriskiewcz*, No. 28265 (Del. I.A.B. June 15, 1926); *Greenwalt v. Windsor*, No. 32739 (Del. I.A.B. May 20, 1926); *Bethlehem Shipbuilding Corp. v. O'Hara*, No. 27936 (Del. I.A.B. Dec. 12, 1924).

[12] See letters of Joseph Andrews, Esquire to I.A.B. dated 12/19/17, 2/9/18, 3/9/18 and 3/27/18 amending pretrial memorandum.

to place most of the commuted amount into a fund administered by NICO under a periodic payment schedule that could only be modified on future orders of the Board.[13]

As to compensation for permanent partial disability, Claimant was evaluated by Dr. Ali Kalamchi, Dr. John Townsend and Dr. Jeffrey Meyers. All three experts routinely testify before the Board and both parties stipulated to their qualifications to evaluate Claimant. Pursuant to their assessments, Claimant would be entitled to 1,199 weeks of permanent partial disability as follows:

Sexual Dysfunction (35%):	62.5 weeks
Bowel (38%):	114.0 weeks
Bladder (20%):	60.0 weeks
Right Arm (90%):	225.0 weeks
Left Arm (8%):	20.0 weeks
Right Leg (67%):	167.5 weeks
Left Leg (0%):	0.0 weeks
Cervical Spine (39%):	117.0 weeks
Thoracic Spine (0%):	0.0 weeks
Lumbar Spine (6%):	18.0 weeks
Brain / Headaches (15%):	45.0 weeks
Chest Wall / Ribs (6%):	18.0 weeks
Pulmonary System (10%):	30.0 weeks
Biliary / Gallbladder (50%):	150.0 weeks
Abdominal Wall (7%):	21.0 weeks
Digestive Tract (20%):	60.0 weeks
Dysesthetic Pain (12%):	36.0 weeks
Appendix (10%):[14]	30.0 weeks
TOTAL WEEKS:	1,199.0 weeks

By law, this lump sum of 1,199 weeks must be discounted to present value at 5% interest with annual rests to avoid a windfall to Claimant and undue expense to Employer. This provides a total payment of $189,719.09 for all permanent partial disability under 19 *Del. C.* § 2326.

As for total disability, the parties stipulated that Claimant is 34 years old and has a remaining life expectancy of 43.19 years, which equates to 2,246 weeks. When multiplied by his

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[13] E.g., *Gunner v. Draper*, No. 24282 (Del. I.A.B. Nov. 16, 1922).

[14] Ordinarily, Employer would have challenged compensability of the appendix on the ground that it is vestigial. 19 *Del. C.* § 2326 requires that the Board find either "loss" or "loss of use" of a body part for there to be any entitlement to permanent partial disability compensation. A prerequisite for a true "loss" of use is that there first be any "use" at all. By definition, any part of the body that is vestigial has no use. Yet, Employer informed the Board that if its petition was granted, it was willing to include these weeks in the permanent disability lump sum payment when discounted to present value to aid its Employee.

compensation rate and then discounted to present value at 5% interest with annual rests, the present value of those weeks equates to an additional $245,298.18 for all total disability under 19 *Del. C.* § 2324. It follows that there would be no entitlement to temporary partial disability under 19 *Del. C.* § 2325. Likewise, Claimant is unmarried and has no dependents who could qualify for compensation under 19 *Del. C.* §§ 2330 and 2333. Thus, there is no liability for death benefits.

Claimant also sustained serious and permanent disfigurements under 19 *Del. C.* § 2326(f) from this industrial accident. For the convenience of the Board, the parties stipulated that all disfigurement compensation that could be attributable to I.A.B. No.: 1448295 would be as follows:

3.5" Horizontal Throat Scar:	12 weeks
2.5" Vertical Throat Scar:	10 weeks
2.5" Right Side Neck Scar:	10 weeks
Chest Puncture Scars and Mottling:	12 weeks
4.5" Right Forearm Scar:	10 weeks
Right Claw Hand:	25 weeks
3.5" Left Shoulder Blade Scar:	8 weeks
Five Right Flank Scars each 2.5":	15 weeks
2 Deep Abdominal Puncture Scars:	20 weeks
2 Deep Puncture Scars in Back:	15 weeks
Altered Gait:	63 weeks
TOTAL WEEKS:	200 weeks

The present value of 200 weeks of compensation for all serious and permanent disfigurement in this claim, after being discounted at 5% interest with annual rests, equates to an additional $48,496.29.

The parties also agree that Claimant's need for medical treatment has plateaued and that the value of all future medical costs attributable to I.A.B. No.: 1448295 would equate to 207 extra weeks of compensation. For this, they relied on the opinions of Employer's expert, Masako Suzuki from Magee, who is Claimant's clinical social worker; Dr. Formal, who is Claimant's treating provider from Magee; Dr. Kalamchi; Dr. Townsend and Dr. Meyers. The present value of 207 weeks of compensation for all future medical treatment that could be attributable to this claim, after being discounted at 5% interest with annual rests, equates to an additional $50,030.58.

Accordingly, after each type of compensation is converted to present value under 19 *Del. C.* § 2358(a), the total value of the remainder of all liability in I.A.B. No.: 1448295 is as follows:

All Total Disability:	2,246 weeks	/	$245,298.18
All Permanent Disability:	1,199 weeks	/	$189,719.09
All Disfigurement:	200 weeks	/	$ 48,496.29
All Future Medical:	207 weeks	/	$ 50,030.58
All Partial Disability:	0 weeks	/	$ 0.00
All Death Benefits:	0 weeks	/	$ 0.00
TOTAL PRESENT VALUE:			$533,544.14

If the Industrial Accident Board authorizes Employer to pay this to National Indemnity Co. under 19 *Del. C.* § 2359 then, by law, there shall be no further recourse against Employer.[15]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

"Compensation" under Delaware's law includes medical costs.[16] It also includes five types of income replacement: (1) total disability;[17] (2) temporary partial disability;[18] (3) permanent partial disability and (4) serious and permanent disfigurement;[19] and (5) compensation to dependents of an employee whose death was caused by an accident that arose out of and in the course of employment.[20]

In this case, Employer seeks an order to commute all future installments of compensation on this claim. A "commutation" under Delaware's law is defined as an employer paying future installments (i.e., weeks) of some or all available compensation in lump sum rather than weekly.[21] When paid in lump, the employer may discount such to present value at 5% interest with annual rests.[22] At the same time, the intent behind Delaware's compensation law is to provide an injured employee with periodic payments "to preclude any possibility of an imprudent employee… wasting

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[15] Pursuant to 19 *Del. C.* § 2301(11) there would also be no further recourse against Employer's insurer, NorGUARD Insurance Co., as the definition of an employer under Delaware's compensation law "shall include the insurer as far as practicable."
[16] 19 *Del. C.* § 2301(5).
[17] 19 *Del. C.* § 2324.
[18] 19 *Del. C.* § 2325.
[19] 19 *Del. C.* § 2326. See, *Coen v. Ambrose-Augusterfer Corp.*, 463, A.2d 265, 267 (Del. 1983).
[20] 19 *Del. C.* §§ 2330 and 2333. That benefits under §§ 2324, 2325, 2326, 2330 and 2333 are income replacement "compensation" and not "damages" is acknowledged by the explicit distinction between the two at 19 *Del. C.* § 2374(e)(3).
[21] *Berryman v. John F. Casey Co.*, 251 A.2d 565, 568 (Del. Super. 1969).
[22] 19 *Del. C.* § 2358(a).

the means provided for his support."[23] Thus, Delaware's compensation law generally disfavors lump sum payouts.[24] Yet, in this case, rather than attempt to downplay the pitfall of lump sums, the Employer has directly addressed that concern by further seeking to use 19 *Del. C.* § 2359 to put the commuted amount in an interest-bearing account that will continue to provide periodic payments to Claimant after an initial lump sum is used as seed money to purchase accommodations in Mexico.

After considering the evidence presented, the Board finds that Employer has proven the necessary elements to warrant full and final commutation of all future installments of compensation in I.A.B. No. 1448295 after being discounted to present value under 19 *Del. C.* § 2358 and to warrant leave under 19 *Del. C.* § 2359 to pay this amount to NICO as discussed further below.

To start, 19 *Del. C.* § 2358(a) provides four different grounds on which the Industrial Accident Board may authorize commutation:[25]

1. If it appears that it will be for the best interest of the employee;
2. If it will avoid undue expense or hardship to either party;
3. If the employee has removed or is about to remove from the United States; or
4. If the employer has sold or otherwise disposed of the whole or the greater part of the business or assets.[26]

While any one of these grounds could be sufficient to award commutation, at least three of the four scenarios exist in this matter to grant Employer's request.

First, it will help Employer avoid undue hardship and expense. This has placed Employer in a difficult position. The sole purpose for Claimant's stay at the Windsor Suites was to continue his out-patient therapy at Magee. As treatment with Magee has not been medically necessary since December 15, 2017 it follows that it was also no longer medically necessary for him to live at the

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[23] *Molitor v. Wilder*, 195 A.2d 549, 552 (Del. Super. 1963); aff'd by *Molitor v. Wilder*, 196 A.2d 214 (Del. 1963).

[24] The only two exceptions to this are that 19 *Del. C.* § 2360 now allows employers to elect to pay compensation for permanent partial disability and disfigurement in lump sum without first seeking prior Board approval; however, Delaware's law mandates that such are still "income replacement" compensation like total and temporary partial disability; see, *Coen v. Ambrose-Augusterfer Corp.*, 463, A.2d 265, 267 (Del. 1983). Lump sums for the remaining types of compensation for which this employee would be eligible must still receive prior Industrial Accident Board approval.

[25] See, *Eure v. Delaware Park*, No. 1125400 (Del. I.A.B. Sept. 13, 2016).

[26] E.g., *Phillips v. U.S. R.R. Admin.*, No. 10988 (Del. I.A.B. Apr. 20, 1921); *Osborne v. Artillery Fuse Co.*, No. 168 (Del. I.A.B. Dec. 24, 1919).

hotel since that date.[27] Once that was no longer medically necessary, Employer's duty to pay for such under the Agreement, and the Board's legal authority to order such, vanished.[28]

Yet, Claimant has continued to stay in the hotel for over five months beyond what Employer had a legal duty to pay. For reasons unrelated to this claim, he is ineligible for future employment in the United States of America. This is further exacerbated by his low compensation rate, which, when combined with his lack of savings, makes finding accommodations on his own difficult. With no end in sight, this qualifies as undue hardship and expense to Employer.[29]

Second, the Board finds that Employer's proposal would be in the best interest of Claimant. The initial lump sum would provide him with enough income to acquire his own accommodations and provide for himself.[30] The Board agrees with the case law Employer provided that when the Board has granted contested commutation petitions, it was usually to allow injured employees to purchase homes or invest in revenue generating endeavors.[31] The facts of this case are in step with that line of Industrial Accident Board case law. One purpose of the compensation law is to allow injured employees to be able to provide for *themselves* so that they do not become destitute.[32] At the same time, another important purpose is to decrease costs on employers as "the employer's limited, certain liability is acknowledged as an important factor in workmen's compensation law."[33] Granting Employer's petition will accomplish both important purposes. It will enable Claimant to provide for himself and avoid the undue hardship of becoming a virtual prisoner in the hotel. It will also allow Employer to avoid additional undue hardship and expense.

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27 E.g., *Commisso v. I-Chem Co.*, No. 1058953 at 22 (Del. I.A.B. Dec. 1, 2014).

28 19 *Del. C.* § 2322(a).

29 As the Board has previously held, under the compensation law an employer does not lose his rights simply because a claimant's personal finances are bad. See, *Polanco v. Port to Port Int'l*, No. 1431892 at 7-8 (Del. I.A.B. Mar. 8, 2016).

30 E.g., *Ciabattoni v. Penn Seaboard Steel Corp.*, No. 6523 (Del. I.A.B. May 6, 1919).

31 See, *Lotharp v. Wilmington*, No. 912842 (Del. I.A.B. Aug. 2, 1996) involving a denied petition for commutation. See also, *Sweeney v. Nat'l Aniline & Chem. Co.*, No. 6760 (Del. I.A.B. June 24, 1920); *Biser v. Nat'l Aniline & Chem. Co.*, No. 7438 (Del. I.A.B. Aug. 9, 1920); *DeVechio v. Gen. Chem. Co.*, No. 37003 (Del. I.A.B. Mar. 21, 1929).

32 "The theory of workmen's compensation laws is that the compensation to be paid shall be in lieu of wages rather than as an award of damages; that is, that the injured employee shall receive a sufficient proportion of his weekly wage *to provide the necessaries of life for himself.*" *Rench v. Edwin H. Vare Inc.*, No. 6758 (Del. I.A.B. Apr. 22, 1919). See also, fn. 20.

33 *Peterman v. Caulk*, 1992 WL 20020 at *5 (Del. Super.); aff'd by *Peterman v. Caulk*, 612 A.2d 159 (Del. 1992).

Third, Claimant intends to relocate to Mexico; thus, he intends to remove himself from the United States of America. This, too, is a statutory ground available to award commutation.[34] A lump sum would allow Claimant to realize this goal and, as the cost of living in Mexico is less than the cost of living in Delaware, the value of this lump sum will go further for Claimant. Taken in conjunction with the other two statutory grounds that have already been determined to be sufficient to grant this commutation, the Industrial Accident Board finds that a full and final commutation of all liability would be in the best interests of the injured Employee and his Employer.

The facts of this case are strikingly similar to those of *Ayala v. Diamond State Recycling*, No. 1354859 (Del. I.A.B. Jan. 31, 2014). Both cases involved a claimant who sustained catastrophic injuries to the spine and other multiple body parts. Both claimants initially received in-patient care at a rehabilitation facility. After a period of time, both claimants were released to out-patient therapy but needed a wheelchair accessible room to continue this. Both employers agreed to pay for their employees to stay at a nearby hotel while they continued out-patient therapy.

Ayala differs from this claim with how each employer handled the case from there. In *Ayala*, the employer took no action for almost a year. During that time, *Ayala*'s employer continued to pay for extended hotel stay, total disability, permanent partial disability and disfigurement.[35] It was only after all that occurred, including after the claimant moved out of the hotel, that *Ayala*'s employer filed a motion for a credit for the cost of the hotel stay. At the hearing, *Ayala*'s employer presented no medical witnesses of its own while the claimant presented medical testimony from Magee Rehabilitation. The Board denied the employer's motion in part by noting that the employer at no time filed any sort of petition to mitigate its costs during the claimant's extended hotel stay.[36]

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[34] E.g., *Frank v. Deemer Steel Casting Co.*, No. 9131 (Del. I.A.B. July 26, 1921); *Simpson v. The Pusey Co.*, No. 33749 (Del. I.A.B. July 30, 1924).

[35] *Ayala v. Diamond State*, No. 1354859 (Del. I.A.B. Aug. 1, 2013).

[36] *Ayala v. Diamond State*, No. 1354859 at 10 (Del. I.A.B. Jan. 31, 2014).

In contrast, the record shows that R & J Construction has handled this case much differently. Here, Employer proactively had Claimant evaluated by multiple experts to ascertain the full extent of future permanent partial disability, medical care and other types of compensation. During that time, Employer continued to pay for the hotel up through the date that Claimant's provider discharged him from needing accommodations. That same day, Employer filed this petition to award the lump sum so as to provide Claimant with enough money to find a place to live on his own all while simultaneously mitigating Employer's costs and preserving its right to challenge further stay at the hotel. Yet, humanely, Employer continued to pay for the accommodations until the Board decided the matter. Employer's handling of this case is thus more in line with those where the Board has previously awarded commutations on petitions filed by employers who have gone above what the law requires for their employees and wished to avoid undue hardship and expense.[37]

To summarize, the Industrial Accident Board finds that Claimant reached maximum medical improvement by October 25, 2017. Therefore, this matter was ripe for Employer to have him evaluated for permanent partial disability and disfigurement. It relies on the opinions of Dr. Ali Kalamchi, Dr. John Townsend and Dr. Jeffrey Meyers and agrees with Employer that Claimant is permanently partially disabled for a period of no more than 1,199 weeks due to this accident. Also relying on the opinions of those experts as well as Mrs. Suzuki and Dr. Formal, the Board finds that Claimant's need for future medical expenses would equate to no more than 207 weeks of compensation. Given his future life expectancy, the Industrial Accident Board further finds that he is entitled to no more than 2,246 weeks of total disability due to this accident. The Board also finds that he would be entitled to no more than 200 weeks of compensation for disfigurement due to this accident. Finally, the Board finds that there is no entitlement to any temporary partial disability or death compensation (i.e., 0 weeks) arising out of I.A.B. No.: 1448295.

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[37] E.g., *State Highway Dep't v. King*, No. 32350 (Del. I.A.B. Dec. 13, 1924).

The Board agrees that it is an undue hardship and expense to Employer to continue to pay for Claimant's accommodations when such has not been necessary since December 15, 2017. Likewise, the effects of his low compensation rate on both parties are "unusual circumstances."[38] Coupled with his desire to relocate to Mexico, this warrants the commutation requested. Therefore, Employer's petition to commute all future liability in this claim is GRANTED. When discounted to present value at 5% with annual rests this equates to the following:

1. $245,298.18 for 2,246 weeks of total disability discounted to present value.
2. $189,719.09 for 1,199 weeks of permanent partial disability discounted to present value.
3. $50,030.58 for 207 weeks for all future medical treatment discounted to present value.
4. $48,496.29 for 200 weeks of permanent disfigurement discounted to present value.

Accordingly, pursuant to 19 *Del. C.* § 2358(a), Employer is hereby authorized to commute all future liability in I.A.B. No.: 1448295 via one lump sum amount of $533,544.14.

The next issue is whether Employer may pay this to NICO to administer on Claimant's behalf. As stated earlier, the compensation law is specifically designed to provide an injured employee with *periodic* payments. Yet, while the Board has not been asked to utilize § 2359 in some time, the way in which Employer seeks to use it addresses the concern of lump sums. As Employer notes, the law sequentially goes from allowing, though generally disfavoring, lump sum payments to claimants (§ 2358); to allowing lump sum payments to financial institutions that then continue periodic payments to claimants (§ 2359); to an all-out prohibition on anything *but* periodic payments "except as otherwise provided" (§ 2360). 19 *Del. C.* § 2359 is in the middle as part of the Compensation Bargain between employer and employee: A compromise between the competing interests for allowing lump sums and prohibiting them. When, as here, the nature of injury renders the amount of future payments certain, § 2359 allows employers the benefit of commutation under § 2358 while continuing to protect employees from the dangers of such lump summing as per § 2360.

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[38] E.g., *Phoenix Steel Corp. v. Brinzo*, 389 A.2d 269 (Del. Super. 1978); *Ciabattoni v. Penn Seaboard Steel Corp.*, No. 6523 (Del. I.A.B. May 6, 1919).

Employer has met its burden of proof here and, as such, it would be in the best interest of all parties to pay the funds to NICO subject to the following requirements:

1. Pursuant to 19 *Del. C.* § 2359, payment by Employer shall immediately operate as a full satisfaction of this award as to Employer. Immediately on tendering payment, neither Claimant, any dependents nor anyone else shall have any further recourse against Employer or its insurer, NorGUARD Insurance Co. ("NorGUARD"), on anything arising out of I.A.B. No.: 1448295.

2. Out of the total commuted amount of $533,544.14, two lump sum payments are hereby ORDERED immediately to be distributed as follows:
   a. One lump sum payment of $148,467.84 to the law firm of Doroshow, Pasquale, Krawitz & Bhaya for the reasons described on page 14 of this decision.
   b. One lump sum payment of $85,076.30 to Jesus Vidal Reyes as seed money to allow him to return to Mexico, purchase his own accommodations and provide for himself.

3. NICO shall thereafter hold the remaining amount of $300,000.00, together with all interest arising from the investment thereof, for the benefit of Jesus Vidal Reyes. Payments from this Fund shall be made by NICO in the same amounts and periods as set forth in this decision and may ONLY be modified by future orders of the Industrial Accident Board of the State of Delaware. To this effect, NICO is ORDERED to issue payments for a period of no less than fifteen years from the date of this decision as per the following schedule:
   a. Pursuant to 19 *Del. C.* § 2360, payment shall hereafter be made MONTHLY to Jesus Vidal Reyes at the rate of $1,981.00 per month beginning July 1, 2018.[39]
   b. Pursuant to 19 *Del. C.* § 2355, this structure cannot be sold, no claim or payment for compensation due or to become due under this case shall be assignable and all compensation and claims therefor shall be exempt from all claims of creditors.

4. If any balance of the lump sum remains after Claimant's entitlement to any type of compensation or benefit allowable under Delaware's law has ceased, it shall be returned to NorGUARD on a signed order of the Board. To ensure this, the Industrial Accident Board hereby ORDERS the following:
   a. NICO shall provide written notice to NorGUARD on the status of this claim and remaining funds as often as reasonably requested, but in any case, no less than annually by the first day of December until Claimant's entitlement to compensation ceases by his death or otherwise, notice of which shall also be provided in writing.
   b. In the event of any future hearings of the Board in this matter, notice shall be provided to Employer's attorney of record in the same manner in which such notices are provided to parties as required by Delaware's law to allow Employer's participation in the proceedings as a party in interest if Employer so desires.
   c. Copies of all future decisions and orders in this matter shall be provided to Employer's counsel of record in the same manner in which such decisions and orders are otherwise provided to parties under Delaware's compensation law.

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[39] This equates to an increased average weekly wage of $683.38 and increased compensation rate of $455.59 per week, both of which 19 *Del. C.* § 2359(a) anticipates through the interest Claimant shall continue to receive from NICO's investments on Claimant's behalf. The increase will allow Claimant the ability to segregate funds for any medical conditions that arise.

The final issue is the assessment of attorney fees and costs. Pursuant to 19 *Del. C.* § 2358(b), "the Board shall not approve a proposed commutation under this section without considering information regarding the amount of attorney fees and costs, if any, the employee will pay in connection with the proposed commutation." Unlike normal petitions, where employers may be required to pay a claimant's attorney fees and costs, commutations require claimants to pay their own attorney fees and costs.[40] This is because a claimant who receives a lump sum (i.e., commutation) does not truly receive a change in status. Once discounted to present value, a lump sum represents the same value that he would have received on the claim if paid periodically.[41]

So, too, Employer's act of petitioning the Board to commute the benefits described herein amounted to a stipulation that Claimant was entitled to those benefits without needing to litigate that issue. There was thus an agreement as to compensation entitlement. The only purpose of the hearing was to seek authority to pay compensation installments in lump (i.e. to commute) rather than periodically. Again, once discounted to present value, Claimant receives the same value to which he was already entitled via Employer's stipulation. Thus, the American rule applies.

Claimant submitted an affidavit into the record showing that he agreed to a contingency fee of 25% of the ultimate commutation amount, which equates to $133,386.03.[42] Pursuant to that fee agreement with his counsel, Claimant also agreed to reimburse his firm for additional costs in the amount of $15,081.78. Accordingly, pursuant to 19 *Del. C.* § 2358(b), out of Employer's $533,544.14 lump sum payment, it is ORDERED that one lump sum payment of $148,467.84 shall first issue to Claimant's counsel's firm to account for all attorney fees and costs in this matter pursuant to page 13 of this decision.

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[40] Cf. 19 *Del. C.* §§ 2320(10) and 2322(e).

[41] E.g., *Berryman v. John F. Casey Co.*, 251 A.2d 565, 568-69 (Del. Super. 1969). Likewise, in this case, the Employer filed the petition for commutation and, ultimately, succeeded.

[42] Claimant's Exhibit 1. See, Board Rule 22(C).

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Employer's petition for full and final commutation of all liability is GRANTED. Likewise, Employer's petition to pay the lump sum under 19 *Del. C.* § 2359 to National Indemnity Co. is hereby GRANTED provided that, out of the $533,544.14 payment made by Employer, one lump sum of $148,467.84 is hereby ORDERED to be tendered to Claimant's attorney's firm under 19 *Del. C.* § 2358(b) and a second sum of $85,076.30 is hereby ORDERED to be paid directly to Claimant. The parties shall enter into a new Agreement to this effect and submit same for approval. Once the above payment is tendered, Claimant shall provide a Receipt to Employer's counsel to file with the Board on said Agreement. Thereafter, National Indemnity Co. shall administer the remaining funds, and any interest arising therefrom, for the benefit of Claimant pursuant to the terms outlined on page 13 of this decision, which may only be amended on future orders of this Industrial Accident Board pursuant to 19 *Del. C.* § 2359.

IT IS SO ORDRED THIS 27TH DAY OF APRIL, 2018.

INDUSTRIAL ACCIDENT BOARD

CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

Mailed Date: 4/27/18