

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JERRY PIERCE,

Claimant,

vs.

TYSON FOODS, INC.,

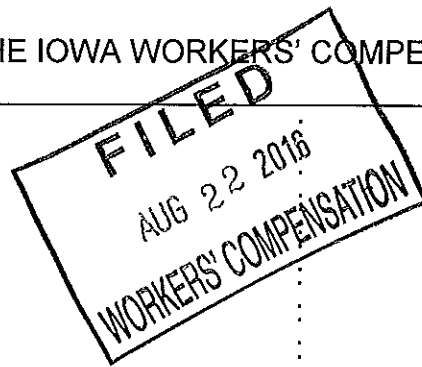
Employer,
Self-Insured,
Defendant.

File No. 5055277

ARBITRATION

DECISION

Head Note No.: 1803



STATEMENT OF THE CASE

Claimant, Jerry Pierce, has filed a petition in arbitration and seeks workers' compensation benefits from, Tyson Foods, Inc., self-insured employer, defendant.

Deputy Workers' Compensation Commissioner, Stan McElderry, heard this matter in Sioux City, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the July 25, 2014 injury arising out of and in the course of employment is to the right metacarpal (finger) or to the hand; and
2. Independent Medical Evaluation (IME).

FINDINGS OF FACT

The undersigned having considered all of the evidence and testimony in the record finds:

The claimant was 64 years old at the time of hearing. He is right handed. He began working for IBP (now Tyson) in May of 1989 and worked until the plant closed in October of 2015.

On July 25, 2014 the claimant was working as a box maker when the plunger mechanism came loose and smashed the long finger of his right hand and the right hand. He was taken to the local hospital in Denison, Iowa and then transported to Omaha, Nebraska. At Denison the impression was 3rd metacarpal fracture of right

hand, 3 cm right hand laceration to the dorsum, and a 3 cm right hand laceration of the palm. (Exhibit 1, page 1) At Omaha Andrew Thompson, M.D., performed surgery to repair the palm of the hand and the fracture of the long right finger. (Ex. 2; Ex. 4) The operative report shows the injury was a compound fracture to the distal metacarpal and to the hand. (Ex. 4) Dr. Thompson eventually rated the injury as 26 percent impairment of the right middle finger. (Ex. A) He charged \$240.00 for the rating. (Ex. B)

The claimant saw Sunil Bansal, M.D., for an independent medical examination (IME) on August 18, 2015. (Ex. 6) Dr. Bansal rated the injury as being to the hand and opined a 6 percent of the right hand impairment. (Ex. 8, p. 8) Dr. Bansal charged \$250.00 for the examination and \$1,545.00 for the report. (Ex. 6, p. 9) Tyson believes that the charge is excessive. (Ex. C)

The Denison Hospital records make clear that the crush injury was to the hand. Dr. Thompson's follow-up care refers to problems (that mostly resolved) with other fingers. (Ex. 2) The injury was to the hand, and the rating to the hand of Dr. Bansal is accepted.

The next issue is to the reasonableness of the IME fee. \$1,795.00 is not excessive for a rating and detailed report. Dr. Thompson may have charged \$240.00 but his rating is in fill-in-the-blank, check-a-box form. Also, it fails to consider that the injury was to the hand and not just one finger, as Dr. Bansal makes clear.

On the date of injury the claimant was single, entitled to one exemption, and had gross earnings of \$525.76 per week. As such, his weekly benefit rate is \$330.88. The commencement date for permanent disability is August 7, 2014, as was stipulated.

REASONING AND CONCLUSIONS OF LAW

Extent of permanent disability.

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 79-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

I found that the claimant suffered a 6 percent permanent loss of use of his right hand due to the July 25, 2014 injury. Based on such a finding, the claimant is entitled to 11.4 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(I), which is 6 percent of 190 weeks, the maximum allowable weeks of disability for a hand.
IME

Iowa Code section 85.39 provides, in relevant part, as follows:

If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and

upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Defendant is responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

The only issue on the IME was whether the cost of \$1,795.00 was reasonable. Based on the completeness of the report, among other factors as discussed above, the fee was found to be reasonable. The defendant shall pay/reimburse as appropriate the IME fee of Dr. Bansal.

ORDER

Therefore it is ordered:

That the defendant shall pay the claimant eleven point four (11.4) weeks of permanent partial disability commencing August 11, 2014 at the weekly rate of three hundred thirty and 88/100 dollars (\$330.88).

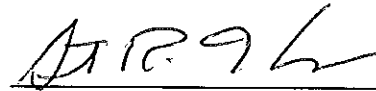
The defendant shall pay/reimburse as appropriate the one thousand seven-hundred ninety-five and 00/100 dollars (\$1,795.00) IME fee of Dr. Bansal.

Defendant shall receive credit for all workers' compensation benefits previously paid.

Costs are taxed to the defendant pursuant to 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 22nd day of August, 2016.


STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SRM/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.