

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUAN CARLOS OCEGUEDA
HERNANDEZ,

Claimant,

vs.

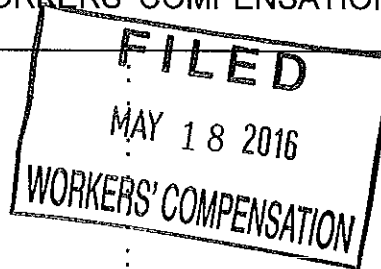
DORMARK CONSTRUCTION CO.,

Employer,

and

BITIMINOUS INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File Nos. 5048814, 5048815

ARBITRATION

DECISION

Head Note Nos.: 1803.1; 1803; 2500; 3001

STATEMENT OF THE CASE

Claimant, Juan Carlos Ocedgueda Hernandez, filed two petitions for arbitration seeking workers' compensation benefits from Dormark Construction Co., and Bitimunos Insurance Company.

The matter came on for hearing on October 21, 2015, before deputy workers' compensation commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 8; defense exhibits A through K; as well the sworn testimony of claimant, Juan Ocegueda Hernandez. Delayne Johnson was appointed to serve as the court reporter. Patricia Vargas-Ver Ploeg was approved as the interpreter for the hearing. She was sworn in. The parties briefed this case and the matter was fully submitted on November 4, 2015.

STIPULATIONS & ISSUES

Through the hearing report, the parties stipulated to the following with regard to File No. 5048814:

1. The parties had an employer-employee relationship at the time of the alleged injury.

2. The claimant sustained an injury to his left eye on October 6, 2012, which arose out of and in the course of his employment.
3. If any permanent partial benefits are owed, the parties stipulate that the injury is to the left eye.
4. Affirmative defenses have been waived.
5. There is no dispute regarding medical payments or temporary disability benefits.

The issues to decide are:

1. The nature and extent of any permanent partial disability. The defendants deny that any permanent disability is causally connected to the work injury.
2. The number of dependents and gross wages are also disputed.

Through the hearing report, the parties stipulated to the following with regard to File No. 5048815:

1. The parties had an employer-employee relationship at the time of the alleged injury.
2. The claimant sustained an injury to his right arm on October 17, 2012, which arose out of and in the course of his employment.
3. The injury was a cause of both temporary and permanent disability; temporary benefits, however, are not in dispute.
4. The commencement date for any permanent benefits awarded is October 17, 2013.

The issues to decide are:

1. The nature and extent of any permanent partial disability. The claimant alleges an industrial disability. The defendants contend the disability is limited to his right arm.
2. The number of dependents and gross wages are also disputed.
3. The claimant seeks medical expenses outlined in claimant's exhibit 8, page 61, which is disputed on the basis of medical causation and mileage as outlined in claimant's exhibit 6, page 57.
4. The claimant seeks IME expense as outlined in claimant's exhibit 3, page 15.

FINDINGS OF FACT

Juan Ocegueda Hernandez (hereinafter, Juan) is a 43 year old Mexican immigrant who now lives in Perry, Iowa. It is stipulated that he is married to Maria Perez. He completed six years of schooling in Jalisco, Mexico. Juan first migrated to California in 1990 at the age of 18. He worked in the field of plastics for several years. He moved to Iowa in 2004 and began working as a laborer for Dormark Construction, the employer in this case. He eventually became a supervisor.

It is stipulated that on October 6, 2014, Juan suffered an injury to his left eye. Something was stuck in a machine; a small rock or object of some type was thrown up from the machine into his left eye. (Defendants' Exhibit I, Deposition, page 21) He sought treatment with Judith Nayeri, D.O., at Concentra on October 11, 2012. She noted that he got a piece of metal in his left eye. (Def. Ex. A-1) "Claims that his vision has not been right since that day. He can't see clearly since 10/6/12." (Def. Ex. A-1) She diagnosed an eyeball contusion and referred him to an eye specialist. (Def. Ex. A-2)

Juan followed up with the Wolfe Clinic in June 2013. He visited Steven C. Johnson, M.D. (Cl. Ex. 4, p. 20)

Juan Hernandez is here for a second opinion. Supposedly last October some saw blade hit the ground, supposedly kicked up a rock that hit his OS. He had some pain and irritation in his OS, was seen with a foreign body irritation and then developed a scar and then all of a sudden these last couple months he's had some progressive worsening of his VA in his OS. He's having no frank pain, irritation or discharge. No past eye surgery.

(Cl. Ex. 4, p. 20) Dr. Johnson diagnosed a corneal scar and hypothesized that he likely developed a posterior subcapsular cataract on his OS [left eye].¹ Juan proceeded with cataract surgery on his left eye in October 2013. (Cl. Ex. 4, p. 26) The surgery was described as phacoemulsification of cataract with implantation of intraocular lens. (Cl. Ex. 4, p. 39) He had appropriate follow up treatment in the following months, including eye drops. (Cl. Ex. 4, p. 35) At the conclusion of his treatment, he was prescribed corrective lenses. (Cl. Ex. 4, p. 37) He had not worn prescription lenses previously.

Juan suffered a second stipulated injury on October 17, 2012. On that date, he was straightening a piece of steel with a bar bender. He fell backward, landing on his back. (Def. Ex. H, Depo. P. 37) He tried to catch himself. He was treated at Mercy Hospital in Sioux City for a right arm fracture. (Cl. Ex. 5, pp. 42-47) Jeremy Vande Zande, M.D., diagnosed right distal radius fracture with minimal dorsal displacement

¹ It is noted that "OS" refers to oculus sinister which is a reference to the left eye.

and placed him in a cast for six weeks along with some medications. (Def. Ex. C) The care was transferred to Raymond Emerson, M.D., at CNOS, who treated him through December 2012. (Def. Ex. D) Dr. Emerson recorded nothing regarding low back complaints.

In April 2013, he followed up with Occupational Medicine Plus, Daniel Miller, M.D. Dr. Miller noted Juan was still having symptoms at that time, including swelling and loss of range of motion. (Cl. Ex. 5, p. 54) In May 2013, he was evaluated at Physiotherapy Associates. The description of the accident is noted that he hit "his lower left back against a temporary wall" when he fell. (Cl. Ex. 5, p. 48) The treatment at that time, however, was focused on his right arm. He returned to Dr. Miller in July. He noted Juan had undertaken four weeks of physical therapy but he still had swelling in his wrist. (Cl. Ex. 5, p. 53) Dr. Miller provided an impairment rating of 5 percent of the upper extremity with no restrictions at that time. (Def. Ex. E-21)

Juan returned to Dr. Miller once again in October 2013, continuing to complain of pain in his wrist, but also, low back pain. The history at that visit notes the following.

Per Heidi Markla, cm for Corvel here w pt today, pt also c/o LBP. There is no documentation in our dictation to this effect, nor on pts health history form he completed on 04/30/13. Heidi states when pt went to PT, he c/o LBP to them stating he struck his back on a temporary wall. Pt states he cont to have occ central LBP w occ rad up into mid-back. He denies any N/T and denies any bowel or bladder trouble. He is not taking any medications. Pt is still employed with Dormark Construction but is not currently working as he has a cataract from another work injury and does not feel it safe for him to return to work. He is scheduled to have surgery for this next Tuesday. He is not restricted in any way for his R hand or his back. Pt denies any prior LBP.

(Cl. Ex. 5, p. 52) The low back claim was denied.

In October 2012, Juan was married. This fact is stipulated. Despite efforts by the defendants, Juan never produced his income tax returns for 2012. His 2014 tax returns were produced demonstrating that, in that year he claimed three children as dependents, Juan, Maricela and Santiago. (Def. Ex. H) "Santiago Flores Ocedgueda" is listed as either Godson or Grandson on the tax form. (Def. Ex. H-29) At his deposition, he testified that he definitely claimed Marciela and Juan as dependents, but could not recall whether he claimed "Jose Santiago" as a dependent. (Def. Ex. I, Depo p. 6) Based upon the record before me, Jose's relationship and dependent status is not clear. The claimant has failed to convince the agency that he had three dependent children at that time. I find Juan was, most likely, married with four dependents for income tax purposes.

In the weeks leading up to his injury dates in 2012, Juan's wages fluctuated rather dramatically. His hourly pay varied between \$27.00 per hour and \$44.29 per hour. His hours of work fluctuated between 31.5 and 93 hours per week. (Def. Ex. J-36) Both parties have prepared summaries of Juan's earning history of the weeks leading up to his injury dates. (Compare Cl. Ex. 7, p. 58 with Def. Ex. J-36) I find that the weeks ending August 4, 2012, and August 18, 2012, were not representative weeks for Juan. In both of those weeks he worked less than 40 hours which was significantly less than his average.

Prior to hearing, Juan was evaluated by Robin Sassman, M.D., for litigation purposes. Dr. Sassman opined Juan had suffered permanent 10 percent impairment in his left eye, a 6 percent functional impairment of his right upper extremity and a 5 percent whole body disability related to his back. (Cl. Ex. 1)

CONCLUSIONS OF LAW

The first question is the claimant's rate of compensation for both injuries. The first sub-issue is the number of dependents the claimant has proven for income tax purposes for the year 2012. The number of dependents is necessary to determine the injured workers' "weekly spendable earnings" under Iowa Code section 85.37 (2015).

I have made a factual finding above that the claimant failed to provide convincing evidence that he was entitled to five exemptions for income tax purposes in 2012. The greater weight of evidence establishes Juan was married and entitled to four exemptions.

The next issue is his average weekly wage for each date of injury.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

By a preponderance of evidence, I find the following weeks and wages to be representative weeks:

9/29/12	82.5 hours	2,227.50
9/22/12	80 hours	2,160
9/15/12	57 hours	1,551.07
9/8/12	57 hours	1,539
9/1/12	59.5 hours	1,606.50
8/25/12	44 hours	1,188
8/18/12	EXCLUDED NONREPRESENTATIVE	
8/11/12	62.5 hours	1,814.47
8/4/12	EXCLUDED NONREPRESENTATIVE	
7/28/12	55.5 hours	1,498.50
7/21/12	93 hours	2,511
7/14/12	83 hours	2,241
7/7/12	71.5 hours	1,930.50
6/30/12	70 hours	1,890
6/23/12	89 hours	2,403
Total wages		24,560.54

(Ex. J, pp. 36, 37)

Therefore, I calculate the claimant's average weekly wage to be \$1,889.27.

Utilizing the appropriate Rate Book, I find the correct rate of compensation for both injuries to be \$1,170.98.

The next issue is exclusive to File No. 5048814. Has the claimant proven his work injury has caused any permanency in his right eye? If so, what is the nature and extent of the disability?

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

I find, by a preponderance of evidence that the claimant has proven that his stipulated work injury is a cause of a permanent functional loss in his left eye. This is based upon the report of Dr. Sassman, combined with the testimony of the claimant. In particular, Juan testified that his eye becomes dry and he has sensitivity to light. In addition, while Dr. Johnson was unwilling to assign a ratable impairment to Juan's left eye, he did prescribe glasses which he had never been prescribed in the past. When asked whether the injury caused the need for glasses, Dr. Johnson provided an equivocal opinion; however, I interpret his final opinion to be that the cataract surgery was at least partially responsible for his need for glasses. (Def. Ex. B-4)

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

The disability in question is to Juan's left eye and the compensation is dictated by Iowa Code section 85.34(2)(p) (2015).

In making an assessment of the loss of use of a scheduled member, the evaluation is not limited to the use of a standardized guide such as the AMA Guides to the Evaluation of Permanent Impairment. Lay testimony and demonstrated difficulties from claimant must be considered in determining the actual loss of use so long as loss of earning capacity is not considered. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420, 421 (Iowa 1994); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). Notwithstanding suggestions to the contrary in the AMA Guides, this agency has a long

history of recognizing that the actual loss of use which is to be compensated is the loss of use of the body member in the activities of daily living, including activities of employment. Pain which limits use, loss of grip strength, fatigability, activity restrictions, and other pertinent factors may all be considered when determining scheduled disability. Bergmann v. Mercy Medical Center, File Nos. 5018613 & 5018614, (App. March 14, 2008); Moss v. United Parcel Service, File No. 881576 (App. September 26, 1994); Greenlee v. Cedar Falls Community Schools, File No. 934910 (App. December 27, 1993); Westcott-Riepma v. K-Products, Inc., File No. 1011173 (Arb. July 19, 1994); Bieghler v. Seneca Corporation, File No. 979887 (Arb. February 8, 1994); Ryland v. Rose's Wood Products, File No. 937842 (Arb. January 13, 1994); Smith v. Winnebago Industries, File No. 824666 (Arb. April 2, 1991).

I adopt the rating of Dr. Sassman as the most reliable, accurate assessment of Juan's loss of use of his left eye. As such, his permanent disability is 10 percent of 140 weeks, or 14 weeks of benefits.

The remaining issues relate to File No. 5048815. Did the stipulated injury of October 17, 2012, cause any permanent condition in his low back or right arm? If so, what is the nature and extent of the disability?

I have already set forth the standards for medical causation in the prior section. It is incorporated by reference herein. The defendants have conceded Juan suffered a functional disability to his right wrist. The only question regarding the arm is the extent of his disability. With regard to the low back, the question is more difficult.

Dr. Sassman diagnosed thoracic back pain and assigned a 5 percent whole body rating. She opined the thoracic back pain is related to the stipulated work injury. The difficulty is that Juan went an entire year without mentioning back pain to any of his medical providers. Having said this, I believe Juan that he hurt his back in the fall; that is, he fell, he hit his back, and he had some pain. There is simply not enough evidence in this file to demonstrate any permanency in his back which is causally connected to the work injury. Consequently, there is not enough corroborating medical evidence to support Dr. Sassman's rating. I find that the claimant has failed to meet his burden that he experienced a permanent disability to his back from the work injury.

Juan has experienced a permanent disability in his right arm. The disability in question is to Juan's right arm and the compensation is dictated by Iowa Code section 85.34(2)(m) (2015).

There are two conflicting ratings. Dr. Miller assessed 5 percent right upper extremity impairment, while Dr. Sassman assessed a 6 percent. I have carefully reviewed each rating and the bases therefore. The ratings are very close. Considering the lay testimony as well and reviewing the entire record as a whole, I find Juan has suffered a 6 percent loss of function of his right arm resulting from the stipulated work injury. This entitles Juan to 15 weeks of benefits at the rate set forth above.

The next issue is medical expenses. The claimant seeks medical expenses as outlined in claimant's exhibits 6 and 8. The defendants dispute causal connection.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

I find the mileage set forth in claimant's exhibit 6 is owed. I find that the bill from CNOS contained in exhibit 8 is causally connected to claimant's work injury. It is owed as well. If it remains unpaid, defendants shall pay it. If it has been paid, it shall be reimbursed.

There is also an IME bill contained in claimant's exhibit 7. Defendants are liable for this bill as well.

ORDER

THEREFORE, IT IS ORDERED:

For File No. 5048814:

Defendants shall pay claimant fourteen (14) weeks of permanent partial disability benefits at the rate of one thousand one hundred and seventy and 98/100 (\$1,170.98) per week commencing on October 6, 2012.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall pay medical mileage for this claim as set forth in claimant's exhibit 6.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants.

For File No. 5048815:

Defendants shall pay the claimant fifteen (15) weeks of permanent partial disability benefits at the rate of one thousand one hundred and seventy and 98/100 (\$1,170.98) per week commencing on October 17, 2012.

Defendants shall have a credit for all benefits paid.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall pay medical mileage for this claim as set forth in claimant's exhibit 6.

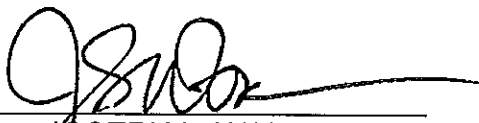
Defendants shall pay medical expenses for CNOS in claimant's exhibit 8, consistent with this decision.

Defendants are responsible for the IME expenses of Dr. Sassman as set forth in claimant's exhibit 7.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants.

Signed and filed this 18th day of May, 2016.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/kjw

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.