

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

---

NICOLAS CASTILLO,	:	
Claimant,	:	
vs.	:	
BOB LENC LANDSCAPING, INC.,	:	File Nos. 5019587, 5019590
Employer,	:	ARBITRATION
and	:	DECISION
SECURA INSURANCE COMPANIES,	:	
Insurance Carrier,	:	Head Note Nos.: 1801; 1804
Defendants.	:	

---

STATEMENT OF THE CASE

Nicolas Castillo filed petitions in arbitration seeking workers' compensation benefits from the above named defendants as a result of an injury he sustained on July 28, 2004 (File No. 5019587) and on March 30, 2005 (File No. 5019590) both of which arose out of and in the course of his employment. The case was heard and fully submitted in Des Moines, Iowa on June 15, 2007. The evidence in the case consists of the testimony of claimant and claimant exhibits 1 through 11 and 14.

ISSUES

The issues presented in both file numbers involve the extent of claimant's permanent disability and whether claimant is an odd-lot employee and/or is permanently and totally disabled.

It was stipulated as to both injuries claimant's gross weekly earnings were \$793.00, he was married and entitled to four exemptions. Based on this information, the correct weekly rate of compensation on both file numbers is \$517.90. It was also stipulated prior to hearing claimant received 22.143 weeks of compensation at the weekly rate of \$518.17.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony of the witness and considered the evidence in the record finds that:

Nicolas Castillo, claimant, was 32 years old at the time of the hearing. Claimant was born in Mexico and completed 8 years of schooling there. Claimant is able to read, write, and speak Spanish. Claimant does not speak English.

Claimant's employment history involved him doing agricultural field work in Mexico from the age of 10. This work required heavy manual labor. Claimant came to the United States in 1999 and began working with Bob Lenc Landscaping, Inc., at that time. Claimant testified that before beginning his employment with this employer he had no prior injuries or restrictions. He also had no problems with depression.

Claimant was initially hired as a helper/general laborer for the employer and then after five years, claimant became a crew leader. In both positions, claimant performed physical labor work. The jobs involved planting trees and plants, placing stones, and also required regular lifting up to and above 50 pounds. He also had to repetitively bend and twist. In 2004, claimant left defendant employer for 7-8 months to work for another landscaper. He eventually returned to work for defendant employer at the time of the first injury in this case.

On July 28, 2004, claimant was placing stones that weighed more than 50 pounds. In trying to pick up one of those stones, claimant injured his back and described having immediate lower back pain with the sensation that it felt as if something had torn inside. Claimant reported the injury to the employer and the employer referred him to medical treatment.

On July 28, 2004, claimant was seen by Physician Assistant Rosalee Fernandez complaining of severe low back pain, but that the pain did not radiate down claimant's lower extremities. Physician Assistant Fernandez diagnosed claimant as having lumber strain, gave claimant an injection and also gave claimant Vicodan and Flexeril. Claimant was taken off work for two days. (Exhibit 1, page 1)

Claimant, on July 30, 2004, was seen by William Maher, D.O. At that time, Dr. Maher restricted claimant to minimal lifting, bending, or twisting. He changed claimant's medication to Darvocet and Soma. (Ex. 1, p. 4)

On August 6, 2004, claimant saw Dr. Maher at which time Dr. Maher noted that claimant still had no radicular symptoms and claimant also reported his pain was much improved. Dr. Maher indicated claimant could gradually increase his work ability, but that claimant should still do no lifting more than 20 pounds and do no pushing or pulling of a wheel barrow. (Ex. 1, p. 6)

Dr. Maher started claimant on physical therapy on August 18, 2004. (Ex. 1, p. 8) On August 25, 2004, Dr. Maher indicated claimant reported that he was starting to have pain radiating down his left leg and Dr. Maher ordered an MRI. Dr. Maher took claimant off work until the MRI was performed. (Ex. 1, p. 11)

The lumbar spine MRI of claimant took place on August 26, 2004. It demonstrated mild to moderate L4-S1 degenerative changes but nerve root compression and significant central spinal stenosis was not confirmed. There was some bulging discs at the L4-5 and L5-S1 levels. (Ex. 1, p. 14)

It was noted in September 2004, by Dr. Maher, that claimant had been missing physical therapy appointments. Claimant was told on September 10, 2004 that he needed to attend physical therapy twice per week. (Ex. 1, p. 17) On September 28, 2004, Dr. Maher stated that claimant was having minimal improvement of his lumbar strain and referred claimant for additional treatment by David Hatfield, M.D. (Ex. 1, p. 20)

Dr. Hatfield saw claimant on October 29, 2004. Dr. Hatfield recommended claimant undergo a CT scan and Dr. Hatfield indicated depending on the findings of that scan claimant would be either followed from a non-operative standpoint or surgical intervention would be considered. Dr. Hatfield restricted claimant to no lifting more than 20 pounds and no repeated bending and twisting. (Ex. 3, pp. 36-37)

The lumbar spine CT scan was performed on December 8, 2004. It showed at the L1-L4 levels and the L5-S1 level no evidence of disc herniation or central canal stenosis. The L2-3 level showed a bulging annulus. The L4-5 level showed a small midline disc herniation slightly to the right side with a slight mass effect on the budding right L5 nerve root. (Ex. 1, p. 23)

Claimant testified that while being on light duty during the summer of 2004 he was returned to work by the employer. He continues to work in light duty up to December 1, 2004 at which time he was laid off along with other employees for seasonal reasons.

Claimant testified that he did not see a physician during the time that he was laid off because the company was shut down and that he had no one to talk to about getting medical treatment. He testified his back pain continued, but it was diminished.

Claimant returned to work on March 17, 2005 and proceeded to do his regular work.

On March 30, 2005, claimant was pushing a wheel barrow containing parts of a tree up an incline. The tree fell to one side and in trying to balance the wheel barrow to keep the tree from falling, claimant twisted his back. He had an increase in his back pain in the same area that he had had before and he reported this injury to the employer.

Claimant was seen by Physician Assistant Von Miller on April 7, 2005. Physician Assistant Miller restricted claimant to no lifting more than 10 pounds and claimant was to avoid repetitive bending and twisting and was to do no pushing or pulling. (Ex. 5, pp. 91-92) Physician Assistant Miller on April 22, 2005 referred claimant to physical therapy and continued the same restrictions. (Ex. 5, pp. 94-95)

An MRI of claimant's lumbar spine was performed on May 5, 2005. It found spondylolysis present at the L5 level and a subtle disc protrusion at the L4-5 level possibly at the L5-S1 level, but with no displacement or compression of nerve roots. (Ex. 5, p. 96)

Claimant returned to Dr. Hatfield on May 23, 2005. He informed Dr. Hatfield that his pain had improved since previously seeing Dr. Hatfield, but that with the recent lifting incident he had had a return of that back pain. (Ex. 3, p. 37) Dr. Hatfield kept claimant on the same restrictions. (Ex. 3, p. 41) On August 24, 2005, Dr. Hatfield took claimant off work. (Ex. 3, p. 43) Claimant testified that he has not worked since that date.

Dr. Hatfield ordered a discography and after receiving the results of that procedure he began discussing surgical intervention with claimant consisting of an L4-5 and L5-S1 fusion. (Ex. 3, p. 44) Claimant made the decision to proceed with surgery on September 7, 2005. (Ex. 3, p. 48) Dr. Hatfield performed the fusion surgery on November 1, 2005. (Ex. 4, p. 80)

Claimant testified that he was treated by Dr. Hatfield for nine months following this surgery.

Claimant underwent a functional capacity evaluation (FCE) on July 12, 2006. The evaluator determined that claimant demonstrated the ability to perform within the light physical demand level in that he was able to lift 15 pounds frequently and 25 pounds occasionally. The evaluator indicated that claimant's current abilities differed significantly from the physical requirements of a landscaper. (Ex. 8, pp. 117-118)

Dr. Hatfield reviewed the FCE and on July 24, 2006 set forth that claimant would have permanent restrictions of no lifting more than 20 pounds and no repeated bending and twisting. (Ex. 4, pp. 62, 71)

On December 20, 2006, Dr. Hatfield related claimant's symptoms subsequent surgery and permanent restrictions to the lifting incident claimant had in July 2004. (Ex. 4, p. 63)

Claimant was seen for an independent medical evaluation by John Kuhnlein, D.O., who issued his report on March 14, 2007. Dr. Kuhnlein's history from claimant set forth claimant's back pain symptoms were not really troubling between December 2004 and March 30, 2005 and that claimant indicated the pain was relatively manageable before March 30, 2005. Claimant indicated he was taking no medications and was working without restrictions. Claimant informed Dr. Kuhnlein that the March 2005 injury permanently increased claimant's low back pain and that the severity of that pain was also increased. Unlike before claimant stated that he had difficulty ambulating after the March 30, 2005 incident. (Ex. 9, p. 133)

Dr. Kuhnlein opined that claimant had a total of 21 percent whole person impairment and that 2 percent of the impairment was attributable to the July 28, 2004 injury and that 19 percent of that impairment was due to the March 30, 2005 injury. Dr. Kuhnlein also opined that claimant would only be able to lift 15 pounds occasionally from floor to waist and waist to shoulder and 10 pounds occasionally over the shoulder. Dr. Kuhnlein stated that claimant would only be able to stoop, bend, and crawl rarely, but that claimant could sit, stand, and walk on an as needed basis. (Ex. 9, pp. 139-140)

Claimant testified that he has become depressed which has caused him to have problems with his concentration. Eva Christiansen, Ph.D., clinical psychologist, examined claimant and issued a report on April 18, 2007. She diagnosed claimant as having depressive and anxiety disorders. She also determined that claimant was not able to concentrate well, which limits claimant's ability to learn new skills such as understanding and speaking English. She opined that claimant was not able to maintain a steady pace he would need many rest periods and that claimant's work attendance would be irregular at best. (Ex. 10, p. 155) She went on to indicate that in her opinion, claimant was psychologically not capable of working and that claimant's injuries and surgeries had created conditions that limit claimant's ability to perform work in the competitive work setting for the foreseeable future. (Ex. 10, p. 156)

A work loss analysis was performed by Roger Marquardt dated May 2, 2007. Mr. Marquardt stated that claimant's restrictions prevent claimant from doing his past work and other unskilled jobs requiring medium or above exertion. Dr. Marquardt noted claimant had limited education and lacked English language skills which further significantly lowered claimant's work potential. Further, claimant's psychological losses

in concentration, ability to carry out simple instruction, maintaining a regular pace and attendance eliminated claimant from any type of competitive employment but also from potential vocational rehabilitation. In his opinion, Mr. Marquardt indicated claimant had incurred a total loss in his ability to work and earn money in the competitive job market.

Claimant testified that he has looked for work at fast food restaurants but is unsure whether or not he would be able to do the jobs for which he has applied. He has written down his restrictions on work applications, but has not been contacted about potential work.

Claimant testified that at the time of the hearing he continues to have constant back pain with pain at times going down his left leg. He finds that he cannot stand for more than one-half hour.

#### REASONING AND CONCLUSIONS OF LAW

The injury of July 28, 2004 resulted in claimant being sent for medical treatment and in fact work restrictions were imposed upon him which only allow him to perform light-duty work. However, claimant returned to the employer in March 2005 and was continuing to do his regular work up to March 30, 2005. It is concluded, based on the opinions of Dr. Kuhnlein, that claimant did not suffer permanent impairment as a result of the July 28, 2004 injury but that his injury resulted in temporary disability only. Claimant is seeking temporary total disability benefits from December 1, 2004 through March 15, 2005. It is concluded that claimant is entitled to such benefits between that period of time.

It is concluded that the injury of March 30, 2005 has resulted in claimant's permanent disability. This injury has resulted in claimant not being able to return to his work as a landscaper crew leader nor will claimant be able to perform the type of work he had in Mexico as an agricultural farm laborer. Claimant's lack of English language skills as well as his psychological problems lead to the conclusion that claimant is precluded from performing work within his experience, training, education, intelligence, and physical capacities. This constitutes being permanently and totally disabled. Further, it is concluded that this injury has made the claimant incapable of obtaining employment in any well-known branch of the labor market. This meets the definition of an odd-lot employee. Therefore, claimant is determined to be permanently and totally disabled. Permanent total disability begins on the date of injury. Therefore, the commencement date for permanent total disability benefits would be March 30, 2005. Any weekly benefits paid by defendant after that date will be credited against the permanent total disability award.

#### ORDER

##### THEREFORE, IT IS ORDERED:

That defendants shall pay claimant permanent total disability benefits at the rate of five hundred seventeen and 90/100 dollars (\$517.90) per week during the period of disability commencing on March 30, 2005.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest pursuant to Iowa Code section 85.30.

That defendants shall receive credit for benefits previously paid.

That defendants shall pay the costs of this action pursuant to rule 876 IAC 4.33.

That defendants shall file subsequent reports of injury as required by the agency.

Signed and filed this 6<sup>th</sup> day of July, 2007.

---

STEVEN C. BEASLEY  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

Copies to:

Mr. James Byrne  
Attorney at Law  
6611 University Ave., Ste. 200  
Des Moines, IA 50311-1655

Mr. Jon K. Swanson  
Attorney at Law  
3737 Westown Pkwy, Ste. 2D  
West Des Moines, IA 50266-1028

SCB/kjw