

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED

JUN - 2 2016

WORKERS' COMPENSATION

ALLEN CONELL,

Claimant,

vs.

NESTLE USA,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5036585

A P P E A L

D E C I S I O N

Head Note Nos.: 1100; 1804; 2500;
2504; 3000; 4000.2

Defendants Nestle USA, employer, and its insurer, Indemnity Insurance Company of North America, appeal from an arbitration decision filed on December 11, 2014. Claimant Allen Conell responds to the appeal. The case was heard on April 28, 2014, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 9, 2014.

The deputy commissioner found claimant carried his burden of proof that the stipulated injury which arose out of and in the course of his employment on November 2, 2010, caused permanent disability to claimant's neck and to claimant's mental state in addition to the stipulated permanent disability to claimant's left hand, arm and shoulder. The deputy commissioner awarded healing period benefits from November 2, 2010, through December 8, 2013. The deputy commissioner awarded permanent total disability benefits commencing December 9, 2013. The deputy commissioner determined claimant's average weekly wage at the time of the injury was \$1,461.00, with the result that claimant's correct weekly benefit rate, classification married with two exemptions, is \$897.34. The deputy commissioner awarded a penalty in the amount of \$1,500.00 for late payment of weekly benefits. The deputy commissioner ordered defendants to authorize a passive prosthetic hand for claimant in addition to the mechanical prosthetic hand already provided. The deputy commissioner awarded payment in the amount of \$19,692.83 for medical expenses itemized in Exhibit 22 for past treatment of claimant's mental injury and the deputy commissioner also ordered defendants to pay for ongoing reasonable and necessary mental health treatment related to the work injury. The deputy commissioner awarded payment in the amount of \$2,995.00 for home nursing services provided by claimant's spouse. The deputy

commissioner ordered defendants to provide alternate medical care by providing evaluation and treatment for claimant's neck. The deputy commissioner also awarded the cost of Dr. Sassman's independent medical evaluation (IME). The deputy commissioner also awarded any unpaid mileage claims.

Defendants assert the deputy commissioner erred in finding claimant carried his burden of proof that the work injury caused permanent disability to claimant's neck and to claimant's mental state in addition to permanent disability to claimant's left hand, arm and shoulder. Defendants assert the deputy commissioner erred in awarding permanent total disability benefits. Defendants assert the deputy commissioner erred in awarding a penalty in the amount of \$1,500.00 for late payment of weekly benefits. Defendants assert the deputy commissioner erred in ordering defendants to authorize a passive prosthetic hand for claimant in addition to the mechanical prosthetic hand already provided. Defendants assert the deputy commissioner erred in awarding payment in the amount of \$19,692.83 for medical expenses itemized in Exhibit 22 for past treatment of claimant's mental injury and for ordering defendants to pay for ongoing reasonable and necessary mental health treatment related to the work injury. Defendants also assert the deputy commissioner erred in ordering defendants to provide alternate medical care by providing evaluation and treatment for claimant's neck.

Claimant asserts on appeal that the deputy commissioner erred in not determining claimant's average weekly wage at the time of the injury was \$1,560.59, with the result that claimant's correct weekly benefit rate, classification married with two exemptions, is \$953.12. Claimant also asserts the deputy commissioner erred in not awarding a penalty of \$5,054.11, rather than awarding a penalty of \$1,500.00.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions reached by the deputy commissioner as follows:

1. I affirm the deputy commissioner's finding that claimant carried his burden of proof that the work injury caused permanent disability to claimant's neck and to claimant's mental state in addition to permanent disability to claimant's left hand, arm and shoulder.
2. I affirm the deputy commissioner's award of permanent total disability benefits.

3. I affirm the deputy commissioner's award of a penalty in the amount of \$1,500.00 for late payment of weekly benefits.
4. I affirm the deputy commissioner's award of payment in the amount of \$19,692.83 for the medical expenses itemized in Exhibit 22 for past treatment of claimant's mental injury and I also affirm the order for defendants to pay for ongoing reasonable and necessary mental health treatment related to the work injury.
5. I affirm the deputy commissioner's order for defendants to provide alternate medical care by providing evaluation and treatment for claimant's neck.

I find the deputy commissioner provided sufficient analysis on all of those issues raised in the arbitration proceeding and I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

I conclude the deputy commissioner erred in ordering defendants to authorize a passive prosthetic hand for claimant in addition to the mechanical prosthetic hand already provided. I provide the following analysis regarding that issue:

Claimant requests a passive prosthetic hand. Defendants have already provided him with a mechanical prosthetic hand with sensors which allow him to control and move the thumb and index finger. After wearing the mechanical prosthetic hand for three or four hours it becomes heavy. (Transcript pp. 33-39; Exhibit A) Dr. Sassman recommended claimant be evaluated by Tom Leisure Prosthetics in Mason City "to be provided other options in addition to his current prosthesis. For example, he would benefit from a passive hand as well as a working hand in addition to his current prosthesis." (Cl. Ex. 8, p. 100)

There was no showing the prosthetic which claimant already has is defective or inappropriate for claimant. At hearing, claimant testified the passive prosthetic hand recommended by Dr. Sassman would be for when he did not want to wear the prosthetic he already has and it would look more like a natural hand. (Tr. pp.34-40)

Iowa Code section 85.27(1) states the following, in pertinent part:

. . . The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.

(Iowa Code section 85.27(1))

The issue is what is meant by "one set of prosthetic devices" in this particular

case. In the arbitration decision, the deputy commissioner stated:

. . . The term "set of prosthetic devices" has been interpreted to mean exactly what it appears to mean: more than one. Schwartz v. Crystal Distribution, File No. 5025555 (Alternate Care, October 5, 2011). In this case, I find that it is unreasonable to deny claimant a set of prosthetic devices for his use in various situations. I order the defendants to comply with Dr. Sassman's recommendations outlined in claimant's exhibit 8, page 100 regarding prosthetic devices.

(Arb. Dec. p. 14)

In arriving at this particular conclusion, the deputy commissioner changes the meaning of the words "one set" in section 85.27(1) as it applies to this case. The obvious meaning is that this is a limitation of one permanent prosthetic device for each particular entitlement. The words "one set" obviously were included for those cases in which a particular claimant requires prosthetic devices for the loss of more than one body part resulting from a single injury. For example, if a worker sustains an injury resulting in the loss of both legs, that worker is entitled to a separate prosthetic device for each leg. In such a situation, the "one set" of permanent prosthetic devices would necessarily need to include two such devices. If the words "one set" were left out of section 85.27, it would lead to the absurd result that a worker is entitled to only one prosthetic device even though the worker needed a separate prosthesis for each leg.

Using the deputy commissioner's interpretation of section 85.27(1) results in there being no limit on the number of permanent prosthetic devices to which claimant might be entitled. If "one set" is interpreted in this case to mean more than one prosthetic device for claimant's left hand, the statutory limitation contained in section 85.27(1) is meaningless because one could come up with additional situations for which claimant might find it desirable to be provided with additional prostheses for his hand. The Iowa Supreme Court has stated it will not interpret statutes in a way which renders portions of them meaningless. State v. Palmer, 554 N.W.2d 859, 865 (Iowa 1996).

Defendants have satisfied their statutory obligation under Section 85.27(1) to provide claimant with "one set of prosthetic devices" by providing claimant with the mechanical prosthetic which he already has for his left hand. Therefore, claimant's request that defendants be ordered to authorize the passive prosthetic hand is denied.

Also, the deputy commissioner erred in awarding claimant healing period benefits from the date of injury, November 2, 2010, through December 8, 2013, when claimant reached MMI. While this may be a distinction without much of a difference in this particular case, a claimant who is awarded permanent total disability is entitled to such benefits as a matter of law under Iowa Code section 85.34(3), beginning on the date the injured worker last worked following the injury and continuing while the worker is unable

to work. Because claimant in this case never worked after the November 2, 2010, injury date, he is entitled to permanent total disability benefits commencing on that date.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of December 11, 2014, is MODIFIED as follows:

Defendants shall pay claimant permanent total disability benefits commencing November 2, 2010, at the weekly rate of eight hundred ninety-seven and 34/100 dollars (\$897.34).

Defendants shall pay accrued weekly benefits in a lump sum, including any underpayment of the weekly benefit rate.

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

Defendants shall be given credit for all weeks of benefits previously paid.

Defendants shall pay a penalty of one thousand five hundred and no/100 dollars (\$1,500.00).

Defendants shall pay the medical expenses outlined in Exhibit 22 for past treatment of claimant's mental injury and defendants shall pay all ongoing charges for that injury.

Defendants shall pay the cost of Dr. Sassman's IME fee in the amount of three thousand five hundred sixty and no/100 dollars (\$3,560.00) as outlined in Exhibit 20.

Defendants shall reimburse claimant for his out-of-pocket medical expenses totaling six hundred seventy-three and 02/100 dollars (\$673.02) as outlined in Exhibit 20.

Defendants shall pay any unpaid mileage claims for treatment for the work injury.

Defendants shall pay home nursing services provided by claimant's spouse in the amount of two thousand nine hundred ninety-five and no/100 dollars (\$2,995.00) as outlined in Exhibit 12, pages 143 through 146.

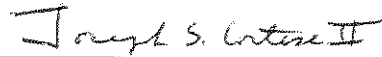
Within thirty (30) days from the date of this decision, defendants shall provide, in writing, the name of an authorized physician for evaluation and treatment of claimant's neck.

Claimant's request for a passive prosthetic hand, as outlined in claimant's Exhibit 8, page 100, is denied.

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

Pursuant to rule 876 IAC 4.33, defendants shall pay the costs of the arbitration proceeding and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

Signed and filed this 2nd day of June, 2016.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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