

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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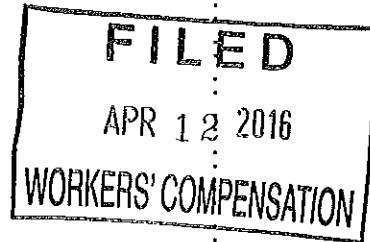
JOE BEGLEY,  
Claimant,

vs.

NESTLE USA, INC.,  
Employer,

and

INDEMNITY INSURANCE COMPANY,  
OF NORTH AMERICA,  
Insurance Carrier,  
Defendants.



File No. 5051530

ARBITRATION  
DECISION

Head Note Nos.: 3000; 3001; 3002

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STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Joe Begley, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on December 26, 2014. Claimant alleged he sustained a work-related injury on May 15, 2013. (Original notice and petition.)

Nestle USA, Inc., is insured for purposes of workers' compensation by Indemnity Insurance Company of North America. Defendants filed their answer on January 7, 2015. The defendants denied the occurrence of the work injury. A first report of injury was filed on May 23, 2013.

The hearing administrator scheduled the cases for hearing on January 20, 2016. The hearing took place in Waterloo, Iowa at the Iowa Department of Workforce Development. The undersigned appointed Ms. Amy Rose-Coenen, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. He was the sole witness to testify.

The parties offered exhibits. Claimant offered exhibits marked 1 through 13. Defendant offered exhibits marked A through H. All proffered exhibits were admitted as evidence in the case. The case was deemed fully submitted on February 22, 2016 when the post-hearing briefs were filed.

#### STIPULATIONS

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on May 15, 2013, which arose out of and in the course of employment;
3. The work injury is a cause of temporary and permanent disability;
4. The commencement date for any permanent partial disability benefits is January 22, 2014;
5. Prior to the hearing, defendants paid unto claimant 45 weeks of permanent partial disability benefits at the rate of \$822.08 per week, and defendants are entitled to a credit for the same; and
6. At the commencement of the hearing, defendants agreed to pay the cost of Dr. Delbridge's independent medical examination and report pursuant to Iowa Code section 85.39.

#### ISSUES

1. Is claimant's injury a scheduled member disability or is it an industrial disability?
2. What is the proper weekly benefit rate?
3. Are defendants liable for the independent medical examination provided by Dr. Manshadi?
4. What are the proper costs to be taxed?

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant at hearing, after judging his credibility, and after reading the evidence, and the post hearing briefs; the undersigned makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)

Claimant is a 60 year old right hand dominant married man. He resides in Evansdale, Iowa. Claimant is a half pack a day cigarette smoker of 30 years duration. He has been advised by his medical providers to cease smoking in order to improve his healing process.

Claimant testified he suffers from "essential/familial tremors" of the bilateral hands. Sangeeta Shah, M.D., has been treating claimant for "familial tremors" of the head and hands. (Exhibit 11 pp. 1-2) The hand tremors pre-date the work injury. Claimant testified his brother, his father, and his uncles all suffer from the same syndrome.

Claimant left high school in the tenth grade in order to begin working. He did obtain his GED in the early 1980's. Then claimant attended a one-year computer programming class at the Business Institute of Cedar Falls. Following his graduation from the vocational school, he worked for three years as a computer operator for the then Norwest Financial in the data processing center. Claimant did not enjoy the work.

Claimant joined Nestle USA, Inc., in September 1992. He passed his pre-employment physical. Throughout the course of his career, claimant held a variety of positions. In 1999, he transferred into the position of packaging maintenance. He maintained the packaging machines and operated the equipment.

On May 15, 2013, claimant sustained amputation of his right index, middle and ring fingers, by a rotary valve machine. The injury occurred at approximately 1:00 p.m. Claimant had mistakenly thought he had de-energized the machine, and properly followed the lockout/tagout safety procedures required by Iowa OSHA.

Claimant was rushed to the Waverly Health Center. (Ex. 6) Because of the traumatic nature of the amputation, claimant was flown by helicopter to the Mayo Clinic. Marco Rizzo, M.D., hand surgeon, performed surgery. The procedure involved:

Irrigation, debridement, and revision amputations of the right index, long, and ring fingers to the middle phalanx.

(Ex. 7, p. 1)

X-rays were taken on May 15, 2013. A. Froemming, M.D., interpreted the results as showing:

Amputation across the middle phalanx of the right 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> digits. The right thumb and small finger appear negative, although the 5<sup>th</sup> digit is in flexion on both views which is indeterminate for soft tissue injury.

(Ex. 8)

On May 16, 2013, claimant underwent a post-injury drug screen per company policy. Claimant tested positive for cannabinoids. (Ex. B, p. 1) During his arbitration

hearing, claimant testified he used marijuana regularly, especially after a stressful day at work. Claimant testified he just smoked a couple puffs at night to assist him with sleeping. He stated he was not under the influence of cannabinoids when his injury occurred. With advice from his union representative, claimant selected to take retirement rather than to be terminated for violating the company drug policy. The effective date of the retirement was May 15, 2013.

Effective July 17, 2013, Ms. Karen Squillace, PA-C, released claimant to return to work with no use of the right hand. (Ex. 9, p. 18) On September 26, 2013, Dr. Rizzo conducted a physical examination of claimant's right hand and wrist. The hand surgeon noted:

#### PHYSICAL EXAMINATION

Musculoskeletal: The Cedaron details his physical exam findings. He does have thickening in the fascia of the palm which is consistent with early Dupuytren's. He has no limitation of extension, fortunately. He has no real tenderness to palpation on his wrists, but the pain he describes is more associated with deeper cramping. His wounds have nicely healed from his amputee sites, and he has, again, excellent range of motion.

(Ex. 9, p. 19)

On May 19, 2014, Dr. Rizzo opined the Dupuytren's disease could be related to the initial work injury. (Ex. 9, p. 21) Dupuytren's disease is a connective tissue disorder that is most common in Caucasian men whose ancestors come from northern Europe. It is more common in men older than 50 years and smoking may increase the risk for developing Dupuytren's disease.

On January 21, 2014, Val Lyons, M.D., conducted an independent medical examination pursuant to a request from defendants. Dr. Lyons wrote in his report of the same date:

#### IMPRESSION:

1. Traumatic amputation of the right index, right middle, and right ring fingers through the middle phalanges.
2. Traction injury to the digital nerves.
3. Partial tear of the triangular fibular cartilage complex on the right.

I think that it is unlikely that his sensory impairment will improve even with further pharmaceutical treatment. I do not anticipate any surgical remedies. As far as his amputations are concerned the stumps are stable. I do not anticipate any significant change. Residual problem partial tear of the triangular fibular cartilage right wrist I do not anticipate any benefits

from surgical intervention. Functionally I think that he is at maximum medical improvement. There is permanent partial disability to the right upper extremity. Two-point discrimination was poor in the stumps of all of the amputated digits, this is similar to the left hand which was not involved in this injury. We will provide a rating based on AMA guidelines.

(Ex. 10, p.2)

Dr. Lyons rated claimant as having a permanent impairment. The physician opined:

- 1) I do find Mr. Begley to be at Maximum Medical Improvement. I do not anticipate any significant change in his status. He has been left with 50% loss of the right index finger, a 50% loss of the right middle finger and a 50% loss of the right ring finger,
- 2) I do not anticipate any need for any further surgery. I do recommend medications for pain control as necessary going forward.
- 3) My current diagnosis for Mr. Begley is traumatic amputation of the right index finger through the distal aspect of the middle phalanx, traumatic amputation of the right middle finger through the distal aspect of the middle phalanx, and traumatic amputation of the right ring finger through the distal aspect of the middle phalanx,

(Ex. 10, p. 3) Later, Dr. Lyons opined that claimant's tremors of the bilateral hands and the other parts of the body were not caused or aggravated by claimant's work injury.

(Ex. 10, p. 4)

On April 28, 2015, claimant exercised his right to an independent medical examination pursuant to Iowa Code section 85.39. Claimant presented to Arnold E. Delbridge, M.D., on January 29, 2015. Claimant reported he had phantom pain and he was depressed over his financial situation. Dr. Delbridge observed:

His left hand has a tremor and his right hand has tremors as well. He indicates that is a family trait. His thinking is the tremor has worsened since his accident. He was planning to see a neurologist on February 5, which he did and that was apparently Sangeeta Shah. Dr. Shah's report was very brief and did not change his diagnosis or comment on the fact that it might have worsened.

There is also a question on the tear of the cartilage in his wrist but he can bend it full range of motion and radial and ulnar deviation is normal. It is not possible, as mentioned above, to know if that occurred in his accident.

On exam in my office, his MP joints were mobile. He has virtually 90 degrees flexion of the PIP joint when he bends them together. He has

trouble bending them individually. He can make a fist. He still has some tingling and sensitivity to rough texture and has to wear a glove. His index finger is 60% amputated, his long finger 70% amputated, and his ring finger 60% amputated.

The circumstances of his accident were that he had a brother who was dying of cancer on the date of his accident and a granddaughter getting worked up for weight loss. His granddaughter had Grave's disease and eventually was treated. He was doing maintenance and was working his eighth 12 hour day that day.

On further exam, his small finger is intact on the right. His thumb is intact. He has good range of motion of his right upper extremity; shoulder and elbow joints. The x-rays of his shoulder show normal bony structures.

His date of maximal medical improvement would be when he was evaluated by Dr. Lyons; 1-21-14. It is doubtful he has significantly improved since that time.

His index, long and ring finger impairment, as a result of the amputation, according to Figure 16-5 in Guides to Evaluation of Permanent Impairment, fifth [sic] edition, is 60% index, 70% long and 60% ring. Converted to hand impairments, that converts to 12% hand impairment for the index, 14% hand impairment for the long, and 6% for the ring. Adding the hand impairments, according to the Guides, yields a 32% hand impairment on the right. That further converts to a 29% upper extremity impairment.

Because of the phantom pain, I would add 2% to his upper extremity impairment which gives 31%. I would also add 2% for cold sensitivity, giving him a 33% upper extremity impairment on the right. That converts, if desired, to a 20% whole person impairment. I am hard pressed to determine whether the tremor is worse and the neurologist shed no light on that. Also, he has a ganglion cyst on the right by the MRI, but once again I am not able to stay [sic] to a reasonable degree of medical certainty, that his ganglion cyst on the wrist is as a result of his traumatic event.

...

My diagnosis of conditions sustained by Mr. Begley as a result of his May 15, 2013 work injury is amputation of index, long and ring fingers and as a result of those amputations he has phantom pain in his remaining stumps and also cold sensitivity in the remainder of his fingers.

...

Please note that I calculated the Guides evaluation of the finger amputations appropriately and then modified it according to Iowa Law, so the final impairment of the hand is 50% of the upper extremity and 45% of the whole person; 27% with 1% added for cold sensitivity and for phantom pain, giving at 29% impairment of the total person.

(Ex. 12, pp. 2-4)

Dr. Delbridge opined claimant could not lift more than 10 pounds with his right hand. (Ex. 12, p. 4) The evaluating physician could not state to a reasonable degree of medical certainty that the ganglion cyst and the torn cartilage in the wrist were caused by the work injury. (Ex. 12, p. 4)

Pursuant to a request from claimant's counsel, Farid Manshadi, M.D., a physiatrist, examined claimant on November 17, 2015. Dr. Manshadi issued a report detailing his opinions concerning claimant's condition following his work injury. Dr. Manshadi wrote:

DISCUSSION: Mr. Joe Begley sustained amputation injuries involving his right hand digits of the 2<sup>nd</sup> through the 4<sup>th</sup> digits. The affected areas are beyond the DIP phalangeals. The x-rays definitely show that the site of amputation is proximal to the PIP joints.

For the sake of impairment I used the American Medical Association's *Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition*, Chapter 16, specifically Page 443, Table 16-5. According to the Iowa law for workman's [sic] compensation, Section 85-34(2)(G) since Mr. Begley has loss of more than one phalange that equals loss of the entire finger or the thumb. As such, the impairment rating for the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> digits will be 100 percent loss of digit. Then using Table 16-1, Page 438, 100 percent impairment of the index or middle finger converts to twenty (20) percent impairment of the right hand. For the 4<sup>th</sup> digit, that translates to ten (10) percent impairment of the right hand. Adding them altogether is fifty (50) percent impairment of the total hand. Then using Table 16-2, fifty (50) percent impairment of the right hand converts to forty-five (45) percent impairment of the right upper extremity or twenty-seven (27) percent impairment of the whole person.

Further, as I indicated, Mr. Begley has phantom pain in addition. I used Chapter 18 and I assign another three (3) percent impairment of the whole person for such. Then using the Combined Values Chart, Page 604, the total impairment will be twenty-nine (29) percent impairment of the whole person.

In regard to any permanent restrictions I would assign for Mr. Begley's right hand injury, I recommend for him to avoid any activity which requires

gripping with the right hand. He is also to avoid pushing or pulling with the right hand. He is also to avoid ladders.

(Ex. 13, pp. 2-3)

During his arbitration hearing, claimant testified about his right hand condition. He testified there is a constant ache in the part of his hand that remains and once in a while he has an ache where his fingers no longer exist, especially around the missing fingernails. Claimant demonstrated when he experiences tingling in his right hand, he rubs his hand on his pant leg for 2 to 10 minutes in order to rid the hand of pain. Claimant indicated his hand pain disturbs his sleep approximately one night per week. Claimant also testified cold weather bothers his hand and he must wear a glove. He said it is hard for him to hold a hammer and to grip lumber in his hands. He is unable to climb ladders. Claimant explained he has lost his fine touch and tries to focus on his gripping techniques, such as when he is handling dishes. He testified when he uses power and vibratory tools, his hand aches, including his missing parts.

Claimant is able to drive a fork lift truck at his part-time job. He is employed at Home Depot for 20 hours per week. He is not interested in working more hours per week. His starting wage was \$9.00 per hour but at the time of the hearing he was earning \$9.23 per hour. Claimant testified he is very careful when he lifts heavy objects and he uses both hands at work.

#### RATIONALE AND CONCLUSIONS OF LAW

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).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).



Claimant alleges he has phantom pain and therefore the injury is an unscheduled injury. According to Wikipedia, on March 21, 2016:

Phantom pain sensations are described as perceptions that an individual experiences relating to a limb or an organ that is not physically part of the body. Limb loss is a result of either removal by amputation or congenital limb deficiency. . . .

Phantom limb sensation is the term given to any sensory phenomenon (except pain) which is felt at an absent limb or a portion of the limb. It has been known that at least 80% of amputees experience phantom sensations at some time of their lives. Some experience some level of this phantom pain and feeling in the missing limb for the rest of their lives.

Claimant states in his post hearing brief:

Phantom pain qualifies as an unscheduled injury because it is more similar to a neurological disorder like CRPS than to a scheduled injury. Dowell v. Wagler, 509 N.W.2d 134, 137 (Iowa Ct. App. 1993); see also Hydecker Wheatland Co. v. Bruce, 862 N.W.2d 413 at \*4 (Iowa Ct. App 2015) (unpublished disposition). The Agency has drawn the same conclusion. Reed v. Tyson, File No. 5033048 (Arb. 8/1/11); Means v. Second Injury Fund, File No. 5033141 (Arb. 1/8/15).

(Claimant's brief page 3)

Defendants respond in their post hearing brief:

Claimant is also expected to argue his injury extended into the body as a whole by virtue of phantom pain. While he did testify to phantom pain, it is important to note that in his testimony, he clarified that he has aching in the part of his hand that is present, and once in a while in the part that is absent. It is questionable whether this would even qualify as a permanent disabling condition. In any event, the evidence does not support a finding that he has sufficient disability relating to phantom pain such that it would convert his scheduled injury into a whole body injury under Iowa law.

This issue was addressed by the Iowa Court of Appeals in Dowell v. Wagler, 509 N.W.2d 134 (Iowa App. 1993) That case involved a claimant whose arm was amputated just below the elbow. The Court addressed authorities from other jurisdictions indicating phantom pain may constitute an unscheduled injury if it is disabling in nature. The Court of Appeals stated that phantom pain syndrome or phantom limb syndrome may be compensable as an unscheduled injury, but certainly did not indicate this was automatic in all cases. Id. at 137-138.

(Defendants' brief page 11)

In the Dowell case, the Iowa Court of Appeals stated:

We believe the approach to phantom pain taken by these courts is in line with the language and intent of our statutory workers' compensation scheme. We therefore hold that phantom pain syndrome or phantom limb syndrome may be compensable under Iowa Code section 85.34(2)(u) as an unscheduled disability. Applying the industrial disability test to a given case will require a determination both of the functional loss to the body as a whole and of the change in earning capacity of the individual. See: *Mortimer*, 502 N.W.2d at 14-15; *Simbro* 332 N.W.2d at 887.

Id.

It is the determination of the undersigned; claimant's injury is confined to the hand. Claimant did not explain how his phantom pain affects his employability. No medical provider restricted claimant to less than full time work because of the phantom pain. Claimant has restrictions but the restrictions are for his hand and not for his phantom pain. The phantom pain, by claimant's own admission, is intermittent. It is not present all of the time. Even when claimant does experience the phantom pain, claimant indicated it is at the area where the fingernails should be. Claimant does not explain how pain at the former fingernail area impacted his loss of earning capacity.

Claimant's right hand is to be compensated for the loss of its use. Three physicians were involved in the rating process. Claimant is unable to grip and grasp in the same manner as he had done pre-injury. Because of his compromised grip, claimant should not be climbing ladders. He is not to engage in prolonged pulling activities because of his hand. Claimant does drive a fork lift truck and manages nicely with the operation, although he is very safety conscious. He is not working under any formal restrictions at Home Depot. After reviewing the record, it is the determination of the undersigned deputy, claimant has a permanent partial disability to the hand in the amount of fifty (50) percent.

A permanent disability to the hand is governed by Iowa Code section 85.34(2)(l). The sub-section states:

(l) For the loss of a hand, weekly compensation during one hundred ninety weeks.

Therefore, pursuant to Iowa Code section 85.34(2)(l), claimant is entitled to a 50 percent loss to the hand. A 50 percent loss to the hand equates to 95 weeks of permanent partial disability benefits. The parties stipulated the commencement date was January 22, 2014.

The next issue for resolution is the matter of the weekly benefit rate. Claimant alleges the average weekly wage was \$1,328.85 and the weekly benefit rate for someone married and claiming two dependents was \$838.34. Claimant detailed his

calculations in exhibit 2. Defense counsel listed on the hearing report that the average weekly rate was \$1,301.00 and the weekly benefit rate was \$822.08. Defendants did not explain how they arrived at their calculations. However, in their requests for admissions, at exhibit 5, pages 3 and 9, they admitted the weekly benefit rate was \$825.56.

It is the determination of this deputy, the average weekly wage is \$1,328.86. The proper weekly benefit rate is \$838.34 based upon claimant's calculations.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

In his brief, claimant requests penalty benefits pursuant to Iowa Code section 86.13. However, the issue of penalty benefits was not listed a disputed matter on the hearing report. As a consequence, penalty benefits will not be considered as a bona fide dispute in the case.

The final issue for resolution is the matter of costs. The deputy workers' compensation commissioner has discretion to tax costs. Dickenson v. John Deere Products Engineering, 395 N.W.2d 644, 647 (Iowa Ct. App. 1986).

Defendants acknowledged they would pay for the cost of the independent medical examination conducted by Dr. Delbridge. Claimant is also requesting the cost of the independent medical examination and report that was conducted by Dr. Manshadi.

The Iowa Supreme Court addressed independent medical examinations in the case of Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). The Court did not allow costs to include the expenses of an independent medical examination because the examination was necessary to obtain a report. The Court confirmed the premise; Iowa Code section 85.39 is the only method for reimbursement of an examination by a physician of the employee's choosing. Id. at 846. The Court held the only cost allowable is the preparation of a written report as a taxable cost. Id. at 847.

The following costs are assessed to defendants:

Filing fee	\$100.00
Deposition Transcript	\$100.25
Preparation of Report by Dr. Manshadi	\$200.00
Dr. Lyons Report	\$200.00

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant ninety-five (95) weeks of permanent partial disability benefits at the rate of eight hundred thirty-eight and 34/100 dollars (\$838.34) per week and commencing from January 22, 2014.

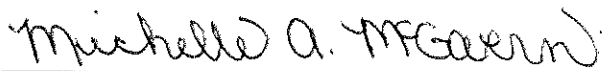
Defendant shall take credit for all benefits previously paid.

Accrued benefits shall be paid in a lump sum with interest, as provided by law.

Costs are assessed to defendant as detailed in the body of the decision.

Defendant shall file all reports as required by this division.

Signed and filed this 12<sup>th</sup> day of April, 2016.



MICHELLE A. MCGOVERN  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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MAM/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.