

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSHUA ISAAC VAN SANT,

Claimant,

vs.

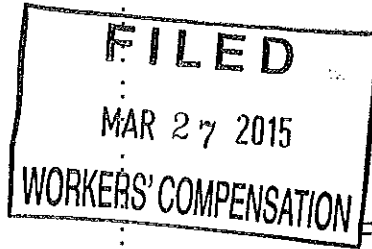
EC SIDING AND ROOFING,

Employer,

and

UNKNOWN

Insurance Carrier,
Defendants.



File No. 5049129

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Joshua Van Sant, claimant, has filed a petition in arbitration and seeks workers' compensation from EC Siding and Roofing, employer, uninsured defendant.

Claimant filed a petition for arbitration on September 29, 2014. Defendant employer failed to file an answer. Claimant moved for default, and default was granted by prior order filed December 16, 2014. As defendant failed to answer and was found to be in default, hearing on this petition was conducted by submission of exhibits and an affidavit of testimony by claimant. Thus the record in this case consists of exhibit 1, claimant's sworn affidavit, and exhibit 2, claimant's medical expenses related to his injury.

The undersigned presided over a hearing where the employer was required to show cause why an assessment should not be imposed on the employer for failure to file a first report of injury in this file. During that hearing, the employer indicated his company was not insured for workers' compensation liability.

ISSUES

As defendant employer did not answer or appear, this decision will address the following issues:

1. Whether there was an employer-employee relationship.

2. Whether the claimant sustained an injury arising out of and in the course of employment on May 30, 2014.
3. Whether the alleged injury is a cause of temporary or permanent disability.
4. Whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.
5. The extent of the claimant's entitlement to permanent partial disability benefits.
6. The commencement date for any permanent partial disability benefits awarded.
7. The correct rate of compensation for the claimant.
8. Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

FINDINGS OF FACT

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

Claimant Joshua Van Sant testified he is 21 years old. His education consists of a high school diploma. He began working for defendant employer in August 2013. His job duties included roofing work and shingling.

On May 30, 2014, claimant was performing work for the employer in Fort Madison, Iowa. When a board came loose on the roof on which he was working, claimant slid and fell off the roof. While falling he grabbed a metal drip edge, which severely lacerated his right hand. He then fell onto a porch roof.

Claimant received medical treatment at Fort Madison Community Hospital where he was treated and released. Claimant was taken off work for a time. He was referred by the employer to a physician in Burlington, Iowa, who in turn referred him to the University of Iowa Hospitals and Clinics.

There claimant was treated by Erica Lawler, M.D. She determined claimant needed surgery, which was performed on July 24, 2014. On October 20, 2014, claimant was released by Dr. Lawler from her care, without any work restrictions. Prior to that, claimant was off work from the date of injury, May 30, 2014 to October 20, 2014 under restrictions. He did work for one week just before the date of surgery.

Today claimant has numbness in the middle finger of his right hand. That finger also has less strength and flexibility compared to before the injury. Claimant estimates he has lost 50 percent of the use of that finger.

CONCLUSIONS OF LAW

The first issue in this case is whether there was an employer-employee relationship.

Section 85.61(11) provides in part:

"Worker" or "employee" means a person who has entered into employment of, or works under contract of service, express or implied, or apprenticeship, for an employer. . . .

It is claimant's duty to prove, by a preponderance of the evidence, that claimant or claimant's decedent was an employee within the meaning of the law. Where claimant establishes a prima facie case, defendants then have the burden of going forward with the evidence which rebuts claimant's case. The defendants must establish, by a preponderance of the evidence, any pleaded affirmative defense or bar to compensation. Nelson v. Cities Serv. Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1967).

Factors to be considered in determining whether an employer-employee relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. Where both parties by agreement state they intend to form an independent contractor relationship, their stated intent is ignored if the agreement exists to avoid the workers' compensation laws, however. Likewise, the test of control is not the actual exercise of the power of control over the details and methods to be followed in the performance of the work, but the right to exercise such control. Also, the general belief or custom of the community that a particular kind of work is performed by employees can be considered in determining whether an employer-employee relationship exists. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McClure v. Union County, 188 N.W.2d 283 (Iowa 1971); Nelson, 259 Iowa 1209, 146 N.W.2d 261; Lembke v. Fritz, 223 Iowa 261, 272 N.W. 300 (1937); Funk v. Bekins Van Lines Co., I Iowa Industrial Commissioner Report 82 (App. December 1980).

Claimant has testified he was an employee of defendant EC Siding and Roofing on the date of injury. There is no contrary evidence.

It is concluded claimant was an employee of EC Siding and Roofing on the date of injury.

The next issue is whether the claimant sustained an injury arising out of and in the course of employment on May 30, 2014.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial

Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

Claimant's testimony describing the work injury is un-contradicted in the record. He was injured while performing normal work duties for the employer, on the premises of a work site where claimant was helping to do roofing work. He had an immediate need for medical attention following the injury.

It is concluded claimant has suffered an injury arising out of and in the course of his employment.

The next issue is whether the alleged injury is a cause of temporary or permanent 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); Dunlavy 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).

Claimant's work injury caused claimant to miss a substantial period of work, as well as the necessity of undergoing surgery. No other cause for his medical condition and absence from work exists in the record. Claimant has also described a permanent impairment of his finger which affects his ability to use his hand. Again, defendants have offered no contrary evidence.

It is concluded claimant's injury has caused both temporary and permanent disability.

The next issue is whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant was off work for 19 4/7 weeks due to his work injury. Claimant has carried his burden of proof to show his inability to work was due to his work injury, including temporary work restrictions.

It is concluded claimant is entitled to healing period benefits for 19 4/7 weeks.

The next issue is the extent of the claimant's entitlement to permanent partial disability benefits.

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).

Claimant's injury to his finger is a scheduled member injury. The loss of a second finger is limited to 30 weeks of benefits. Claimant's estimate of a 50 percent loss of use of that finger is reasonable and conforms with the rest of the record. There is no contrary evidence.

It is concluded claimant has carried his burden of proof to show he has suffered a 50 percent loss of his right second finger. Claimant is entitled to 15 weeks of benefits.

The next issue is the commencement date for any permanent partial disability benefits awarded.

Claimant was released from care without any restrictions by Dr. Lawler on October 20, 2014. The commencement date for permanent benefits is found to be October 21, 2014.

The next issue is the correct rate of compensation for the claimant.

Claimant earned \$11.00 per hour at the time of his injury. He worked 40 hours per week. Claimant submits an average weekly wage of \$440.00. He is single with no dependents, and therefore his rate of compensation is concluded to be \$281.10 per week.

The next issue is whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

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 1975).

Claimant has submitted a list of his medical expenses incurred for this injury. (Exhibit 2) His medical bills total \$31,856.84. It is concluded the employer is liable to claimant for the full amount of his medical expenses.

ORDER

THEREFORE IT IS ORDERED:

Defendant shall pay unto the claimant healing period benefits, from May 30, 2014 to October 20, 2014, at the rate of two hundred eighty one and 10/100 dollars (\$281.10) per week.

Defendant shall pay unto the claimant fifteen (15) weeks of permanent partial disability benefits at the rate of two hundred eighty-one and 10/100 dollars (\$281.10) per week from October 21, 2014.

Defendant shall pay accrued weekly benefits in a lump sum.

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

Defendant shall pay the claimant's prior medical expenses submitted by claimant at the hearing.

Defendant shall pay the future medical expenses of the claimant necessitated by the work injury.

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

Costs are taxed to defendant.

Signed and filed this 27th day of March, 2015.



JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JEH/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.