

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

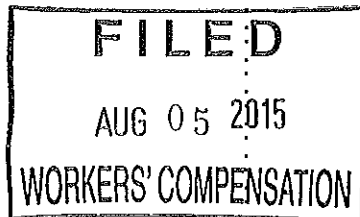
GLEN MILLS,
Claimant,

vs.

NASH FINCH,
Employer,

and

XL INSURANCE COMPANY,
Insurance Carrier,
Defendants.



File No. 5060013
ARBITRATION
DECISION

Head Note Nos.: 1800; 1803; 1108;
1400; 1802; 3701

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Glenn Mills, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on June 25, 2014. Claimant alleged he sustained a work-related injury on January 14, 2014 when the semi-truck he was driving hit black ice and tipped. (Original notice and petition)

Defendant, Nash Finch, was insured for purposes of workers' compensation by XL Insurance. Defendants did not deny the occurrence of the work injuries.

The hearing administrator scheduled the case for hearing on May 5, 2015 at 3:00 p.m. The hearing took place in Cedar Rapids, Iowa. The undersigned appointed Ms. Angela Weible-Jones, 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 9. Defendants offered exhibits marked A through H. All proffered exhibits were admitted as evidence in the case. Post-hearing briefs were filed on May 19, 2015. The case was deemed fully submitted on that date. For the record, it was extremely difficult for the undersigned deputy workers' compensation commissioner to read some of the medical records provided. The print was blurry and the type was so small it was difficult to decipher the words on the pages.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury.
2. Claimant sustained injuries on January 14, 2014, which arose out of and in the course of his employment;
3. Claimant was injured in a semi-tractor trailer crash in the course of his employment with Nash Finch;
4. Causation to disability is no longer in dispute;
5. Temporary benefits are no longer in dispute;
6. The parties stipulate the correct weekly benefit rate is \$745.41 per week;
7. Defendants have waived any affirmative defenses they may have had available; and
8. Claimant is entitled to a credit for benefits paid prior to the date of the hearing.

ISSUES

The issues presented are:

1. There is the issue of the extent of permanent partial disability benefits;
2. Whether the cost of the independent medical examination pursuant to Iowa Code section 85.39 is reasonable;
3. Whether claimant is entitled to certain medical benefits as detailed in Exhibit 8; and
4. There is the issue of the taxation of costs.

FINDINGS OF FACT

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, 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 62 year old married father of adult children. He is left hand dominant. Claimant resides in Walker, Iowa and lives on his family farm. It is a small community of 750 residents near Cedar Rapids, Iowa. Claimant has a high school diploma. He testified his grades were mostly C's, D's, and F's. Claimant testified he had no specific skills. He does hold a current Iowa Commercial Driver's License.

For approximately 40 years, claimant worked in some capacity for Nash Finch. Some of his jobs included working as a selector, grocery picker, truck loader/unloader, produce inspector; he also worked as a part-time truck driver for 25 to 30 years and as a full time truck driver for 1 and ½ years.

According to claimant's testimony, he had a variety of duties at Nash Finch. Routinely, claimant would lift packages that weighed from 5 to 90 pounds. Claimant also pulled a hand jack with products weighing up to 2,500 pounds. For numerous years, claimant has operated Mills Farms. Now claimant's sons perform most of the duties on the farm. Claimant testified he drives the tractor or combine.

After the motor vehicle accident occurred on January 14, 2014, claimant was transported to Blessing Hospital in Quincy, Illinois. (Exhibit 1, page 4) Claimant complained of multiple injuries. Christian Zwick, M.D., diagnosed claimant with:

1. Multiple rib fractures, right.
2. Multiple transverse process fractures.
3. Scapular fractures.
4. Likely pulmonary contusion.

(Ex. 1, p. 4) Pain medication was prescribed. (Ex. 1, p. 5)

David P. Hart, M.D., performed a right rotator cuff repair, a right biceps tenotomy and a right subacromial decompression with distal clavicle claviculoplasty on July 8, 2014. The surgery was performed at the Surgery Center of Cedar Rapids. (Ex. 5, p. 1) Claimant was taken from the surgical room in satisfactory condition. (Ex. 5, p. 2)

On January 12, 2015, Dr. Hart opined claimant had reached maximum medical improvement. The surgeon provided a permanent impairment rating for claimant. (Ex. 4, p. 18) Dr. Hart opined:

ASSESSMENT

PLAN

Using the AMA's fifth edition guide to the evaluation of permanent impairment, the following impairment rating was performed today. Using a range of motion model the patient is awarded 6% impairment. Based on

table 16-35 he would be awarded an additional 2% for weakness detected on manual motor testing, impairment would be 8% right upper extremity. Table 16-3 converts this to a 5% whole person rating.

Final impairment rating right shoulder:

8% right upper extremity

5% whole person

No restrictions and follow up necessary.

(Ex. 4, p. 18)

Pursuant to Iowa Code section 85.39, claimant exercised his right to an independent medical examination. On January 30, 2015, Sunil Bansal, M.D., M.P.H., conducted an independent medical evaluation. Dr. Bansal diagnosed claimant with:

RIBS:

Multiple right-sided rib fractures.

Right Shoulder:

Full thickness rotator cuff tear of the right shoulder, possible biceps tendon tear. Status post right shoulder arthroscopic rotator cuff repair, biceps tenotomy, subacromial decompression, and distal clavicle claviculoplasty.

Back:

Aggravation of lumbar spondylosis with L3-L4, L2-L3, and L4-L5 bulging discs.

(Ex. 6, p. 13)

Dr. Bansal provided the following ratings for claimant's work-related injuries:

RIBS:

No ratable impairment.

RIGHT SHOULDER:

Full thickness rotator cuff tear of the right shoulder, possible biceps tendon tear. Right shoulder arthroscopic rotator cuff repair, biceps tenotomy, subacromial decompression, and distal clavicle claviculoplasty.

Mr. Mills had a large full thickness rotator cuff tear and partial biceps tendon tear. Understandably, he has been left with a degree of range of motion loss of his shoulder.

With reference to the **AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (Guides)**, specifically Figures 16-40 through 16-46 and comparing to the left shoulder, we find that Mr. Mills is assigned:

	RANGE OF MOTION	% UE IMPAIRMENT
Flexion:	153, 152, and 152 degrees	2
Abduction:	140, 140, and 140 degrees	2
Adduction	32, 32 and 30 degrees	1
External Rotation:	76, 78, and 78 degrees	0
Extension	40, 40, and 42 degrees	1
Internal Rotation	64, 62, and 60 degrees	2

This equals an 8% upper extremity impairment, which is equal to a 5% impairment of the body as a whole.

BACK:

With reference to the **AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (Guides)**, based on his current symptomatology and physical examination, he meets the criteria for a DRE Category II impairment. He has radicular complaints, guarding, and loss of range of motion. He is assigned a **5% whole person impairment based on Table 15-3.**

(Ex. 6, pp. 16-17)

Dr. Bansal imposed the following restrictions:

I would place a restriction of no lifting greater than 20 pounds occasionally, 10 pounds frequently, along with no lifting greater than 5 pounds over shoulder level with the right arm and no frequent over shoulder work with the right arm.

No frequent pushing or pulling with the right arm, and no pushing or pulling greater than 20 pounds with the right arm.

No frequent bending, climbing, or twisting to avoid further damage to the back, and to keep pain levels in check.

(Ex. 6, p. 17)

Defendants requested a subsequent examination and report from Chad D. Abernathey, M.D., a board certified neurosurgeon in Cedar Rapids, Iowa. Dr. Abernathey examined claimant on April 24, 2015. The neurosurgeon recommended:

Mr. Glenn Mills clinically presents with chronic left anterior thigh paresthesia. I do not recommend an aggressive neurosurgical management. Therefore, there is no evidence of any significant spine injuries or spine related issues at this time based upon evaluation. I discussed my opinion with the patient in detail. He states he fully understands the breadth of our conversation and concurs. His neural elements are relatively well decompressed on his MRI and his neurologic function is intact and there are no acute or objective findings. The patient fully understands the breadth of our conversation and concurs. I will be available for further consultation if so desired in the future.

(Ex. 7, p. 2)

In his report of the same date to defendants' attorney, Dr. Abernathey opined:

1. I do not believe that any additional medical management is indicated regarding any lumbar spine issues.
2. I do not believe that the patient has any permanent impairment related to his lumbar spine. There is no evidence of any acute or traumatic injury.
3. I do not believe that the patient has any restrictions related to his lumbosacral spine.

(Ex. 7, p. 1)

Claimant testified during his hearing that he was terminated from his employment with Nash Finch. He said the company indicated he had incurred a bad safety record with respect to his driving. Claimant testified he had been involved in only one other accident. At the time of his employment, claimant was earning between \$19.60 and \$19.80 per hour.

Claimant also testified he was unable to push and pull objects. He was unable to lift anything above 20 pounds.

At the time of the hearing, claimant was engaged in full time employment at Lazer Spot Trucking in Cedar Rapids, Iowa. He is stationed at the International Paper

yard. Claimant commenced his employment in February 2015 at the hourly rate of \$16.50 per hour. He testified he does not earn over-time wages. He is capable of performing his duties, as he just drives trailers from one dock to another dock at the paper company. Claimant described the work as "simple work" not heavy labor.

RATIONALE AND CONCLUSIONS OF LAW

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

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).

There are two impairment ratings of five percent to the body as a whole for the shoulder. There is a difference of opinion whether claimant's pre-existing back condition is work-related. While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant

is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

It is the determination of the undersigned; claimant's back condition is related to his work injury on January 14, 2014. From the onset of the motor vehicle accident, claimant complained of back pain. Dr. Bansal detailed in his report why he opined the back condition was work-related. (Ex. 6, pp. 15-16) He provided citations to research materials to support his medical opinions. Dr. Abernathey did not explain why he reached the opposite conclusion. This deputy is according more weight to the opinions of Dr. Bansal than to the opinions of Dr. Abernathey in this case. Dr. Bansal opined claimant had a permanent impairment to the back in the amount of 5 percent to the body as a whole.

This deputy has reviewed all of the factors concerning industrial disability. Claimant is 62 years old. He has a high school diploma but he did not perform especially well in school. He is not going to be a candidate for retraining. Claimant does hold an Iowa Commercial Driver's License. He was terminated from Nash Finch. The basis for the termination was allegedly claimant's driving record. Claimant had two motor vehicle accidents. He was a 40 year employee. Claimant is currently employed driving tractor-trailers in a warehouse lot. He is earning approximately \$3.00 per hour less than he earned at Nash Finch. Claimant has experienced an actual loss of earnings. It is the determination of the undersigned; claimant is entitled to an industrial disability in the amount of 30 percent. Defendants shall pay unto claimant 150 weeks of permanent partial disability benefits at the stipulated weekly benefit rate of \$745.41 per week and commencing from January 12, 2015.

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).

Defendants shall take credit for all permanent partial disability benefits paid prior to the date of the filing of this decision.

The next issue deals with medical bills pursuant to Iowa Code section 85.27. Claimant detailed the bills in exhibit 8 pages 1-3. The bills are due to Mercy Medical Center for dates of service on January 24, 2014 and January 28, 2014.

On January 24, 2014, claimant was examined by his primary care physician Marc Wilkinson, M.D., for a "follow-up of his diabetes and hypertension". Those conditions were personal to claimant. The treatment was outside the care claimant needed for his work injuries. Defendants are not liable for the costs to treat claimant on January 24, 2014.

With respect to January 28, 2014, Dr. Wilkinson ordered a chest x-ray which occurred on the 28th. The chest x-ray was reasonable and necessary treatment, given the rib fractures claimant sustained and the need for follow-up treatment. Defendants are liable for the costs of claimant's medical treatment on January 28, 2014 and as reflected in exhibit 8, page 3.

The final issue is the reasonableness of the cost of the Independent Medical Examination by Dr. Bansal. Dr. Bansal charged \$2,595.00. The fee covered reviewing medical records, physically examining claimant and issuing a 16 page report. It is the determination of this deputy; Dr. Bansal's fee pursuant to Iowa Code section 85.39 is reasonable. Defendants are liable for the cost of the Independent Medical Examination.

Defendants shall be liable for all other costs incurred by claimant.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one hundred-fifty (150) weeks of permanent partial disability benefits commencing from January 12, 2015 and payable at the weekly benefit rate of seven hundred forty-five and 41/100 dollars (\$745.41) per week.

Accrued benefits shall be paid in a lump sum, together with interest, according to law.

Defendants shall take credit for all permanency benefits paid prior to the filing of this decision.

Defendants shall pay medical benefits incurred on January 28, 2014 at Mercy Medical Center and as detailed in exhibit 8, page 3.

Defendants are liable for the cost of the Independent Medical Examination performed by Dr. Bansal in the amount of two thousand five hundred ninety-five and no/100 dollars (\$2,595.00).

All other costs are assessed to defendants.

Defendants shall file all subsequent reports as required by law.

Signed and filed this 5th day of August, 2015.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.