BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 28 2017
WORKERS' COMPENSATION

CHRISTOPHER MARTIN, Claimant, vs. PRESTIGE PROPERTIES, LLC, Employer, and STATE FARM FIRE & CASUALTY, Insurance Carrier, Defendants.	File No. 5048828 ARBITRATION DECISION Head Note Nos.: 2001; 1801; 1803; 1803.1

STATEMENT OF THE CASE

Christopher Martin filed a petition for arbitration seeking workers' compensation benefits from Prestige Properties, LLC, and State Farm Fire & Casualty.

The matter came on for hearing on January 15, 2016, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Cedar Rapids, Iowa. The hearing began at 8:15 a.m. and ended at 4:54 p.m. The record in the case consists of claimant's exhibits 1 through 29; defense exhibits A through S; as well the sworn testimony of claimant, Christopher Martin and his wife, Dawn Martin. In addition, Michael Oliveira, general manager, and Richard Johnson, maintenance, testified on behalf of Prestige Properties. The defendants objected to three exhibits, 13A, 16A and 22, on the basis of timeliness and prejudice. The objections were overruled, although the record was held open briefly to allow defendants additional time to respond to exhibit 22, which were medical bills produced to the defendants just a few days prior to hearing.

Alanna Jeffery was appointed the official reporter for this hearing. The parties briefed this case and the matter was fully submitted on March 1, 2016.

ISSUES AND STIPULATIONS

The primary fighting issue in this case is the claimant's relationship with the defendant, Prestige Properties. The claimant alleges he was hired by Prestige Properties as an employee. Prestige Properties alleges that the claimant was contracted as an independent contractor. The relationship between the parties began on October 27, 2012. On October 30, 2012, the claimant fell from a ladder while

performing work for Prestige Properties. The claimant alleges that incident constituted an injury which arose out of and in the course of his employment. The defendants do not deny he fell from the ladder; rather, they assert that the claimant was an independent contractor. The defendants dispute that any work injury caused any level of temporary or permanent disability. The claimant alleges that he is totally disabled as a result of the injury.

The parties stipulate that the claimant was married with 5 exemptions at the time of the alleged work injury. The claimant alleges his gross earnings were $1,800.00 per week. The defendants allege gross earnings of $293.00 per week. Affirmative defenses have been waived other than the defendants contend claimant was an independent contractor. The claimant seeks medical expenses as outlined in claimant's exhibit 22 and these bills are disputed primarily on the basis that there was no employer-employee relationship. Costs are also disputed.

FINDINGS OF FACT

Christopher Martin is a 53 year old married father of three who resides in Cedar Rapids, Iowa. He is skilled in a variety of construction services. For years he owned and operated Martin Construction Services, LLC, which performed general contracting work in the Cedar Rapids area. He is a skilled, experienced construction carpenter. (Claimant's Exhibit 25) He performed commercial and residential construction. (Transcript, page 25) Mr. Martin also started another LLC, Martin Inspection Technologies, which he utilized to bill Northeast Iowa Community College for welding inspection and training services at the Caterpillar plant located in Elkader, Iowa. (Tr., p. 28) His wife, Dawn Martin, helped run the businesses. She testified that he closed his contracting business in 2011. He ceased carrying insurance for his business, including workers' compensation. (Tr., p. 151) According to Ms. Martin, the contract between Martin Inspection Technologies and NICC ended in July 2012. (Tr., p. 29)

The defendants contend that Martin Construction Services, Inc., was still in operation and performing work until at least August 2011, or possibly after. (Def. Ex. H, pp. 4-6) Defendants assert that business records demonstrate that both of the business entities continued to maintain their status and bill after the dates that Mr. and Mrs. Martin allege they ceased operations. (Def. Ex. H, pp. 8-19; Def. Ex. I, pp. 3, 6; Tr., pp. 44-45)

On July 26, 2012, Michael Oliveira, contacted Mr. Martin. Michael Oliveira was the general manager of Prestige Properties. Prestige Properties is a business that rents properties to students and University of Iowa employees in Iowa City, Iowa. (Tr., p. 209) The two men had met previously. Mr. Oliveira was seeking someone to perform carpentry work at apartment buildings owned by Prestige Properties. Phone records verify that the two men spoke on July 26, 2012. (Cl. Ex. 23) Mr. Oliveira conceded that the two men spoke on that date, although he testified it was possibly July 25, 2012. (Tr., p. 222-24)

Mr. Oliveira described the conversation as follows. "I said, We have some work available. I need a skilled carpenter with your skill set that has the experience. We have some fiberboard siding on that building that requires – that needs to be replaced." (Tr., p. 223) He testified that they negotiated. Mr. Martin wanted $75.00 per hour. Mr. Oliveira claimed he responded that they do not pay their contractors that much and offered a lower rate. "And I specifically said that he would have to come in and fill out a W-9, provide a certificate of insurance and he would be working under the direction of Richard Johnson." (Tr. p. 224) During that phone call, Mr. Oliveira provided the phone number for Mr. Johnson, the maintenance supervisor, Mr. Johnson.

Mr. Martin testified regarding that conversation as well. He had a dramatically different recollection of the short phone call. He testified that Mr. Oliveira asked, "What have you got going on tomorrow?" (Tr., p. 114) He proceeded to explain that he needed "help." (Tr., p. 114) Mr. Martin testified that he replied as follows. "And the first thing I said to him - - I says, Mike, I says, I'm not set up to do any contract work right now. That was the very first thing I said. And I said, How can I help you? He says, Well I need some framing repairs and siding repairs down here. And he was pretty rushed. I know a little bit about these things . . . And he was in the turnaround of the apartment down there in Iowa City for all the kids." (Tr. p. 115) He went on to describe the remainder of the conversation in detail, specifically that it "would have to be on your dime, . . ." (Tr., p. 116) He testified that Mr. Oliveira hesitated and then agreed. (Tr., p. 116) According to Mr. Martin the two men agreed he would bring his own tools but not supplies. It is undisputed that no written bid was ever submitted. No written contract was submitted.

Mr. Oliveira testified that he and his staff accountant Hezhen Shen, met with Mr. Martin in the morning on July 27, 2012, at Prestige Properties. (Tr., p. 227) He testified that Ms. Shen gave Mr. Martin a W-9 form and information to fax his insurance information to Prestige Properties. (Tr., pp. 227-28) Ms. Shen testified in her deposition that she did recall giving a W-9 form to Mr. Martin and she asked him for proof of insurance. (Cl. Ex. 28, Shen Depo, p. 27) Ms. Shen, however, did not have a specific recollection of the meeting. She did not recall whether Mr. Oliveira was there, what date the meeting occurred and she admitted that there was no documentation of the meeting. (Cl. Ex. 28, Shen Depo, pp. 26-28) When asked how she knew that she gave him a W-9 before he began the project, she answered, "Because that's what I always do." (Cl. Ex. 28, Shen Depo, p. 27) I find Ms. Shen's testimony of little value because her recollection is so vague.

Mr. Martin, however, did not start work in the morning on July 27, 2012. He has a dependent son, for whom he needed to arrange care. (Tr., pp. 119-20) He made several phone calls on the morning of July 27, 2012, from Cedar Rapids to Mr. Johnson. This is verified in claimant's cell phone records. (Cl. Ex. 23) Based upon those records, it appears that the claimant arrived in Iowa City shortly before noon on July 27, 2012.

Mr. Johnson told the claimant he would start work on July 27, 2012, at a building owned by Prestige at 507 Linn Street in Iowa City. (Tr., p. 118) He further informed Mr. Johnson that he would not be to work until later in the morning as he had to make arrangements for someone to stay with one of his sons. Shortly before noon on July 27, 2012, Mr. Martin met Mr. Johnson at the rental unit agreed upon. Mr. Johnson instructed Mr. Martin on the areas of the building where siding needed replaced or repaired. (Tr., p. 122) Mr. Martin did not bring any workers with him, nor did he have any construction materials. (Tr., p. 117) Before meeting with Mr. Johnson and beginning to work, Mr. Martin did not meet with Mr. Oliveira or any other employees of Prestige. No paperwork was filled out defining the terms of his work for Prestige before he began working. (Tr., p. 125) Mr. Martin testified that Mr. Johnson told him to report to work at 8:00 a.m. on Monday, July 30, 2012. Mr. Martin used his own tools. Prestige provided all of the materials.

On July 30, 2012, Mr. Martin appeared for work as agreed and began performing his work. He began working on a second floor area with the use of his ladder approximately 10 to 12 feet above the ground. While performing work on the siding, the ladder began to slide out from underneath him. Mr. Martin fell hard to the ground, landing on the concrete on his left ankle. He could not stand on his left leg at all. He crawled to his work bench, retrieved his cell phone and called Mr. Johnson who came immediately and transported him to Mercy Hospital in Iowa City.

Mr. Martin was treated at Mercy Hospital. (Cl. Ex. 1) X-rays and a CT scan were performed which demonstrated fractures in his left foot. (Cl. Ex. 1, pp. 5-7) Mr. Martin was referred to a specialist for follow up. He saw James M. Pape, M.D., on August 2, 2012.

On August 2, 2012, Mr. Martin emailed Mr. Oliveira asking for information about his workers' compensation coverage. (Cl. Ex. 19, p. 7) Mr. Oliveira responded that Mr. Martin was not an employee and that he would need to file the claim under his own insurance. "You specifically told me you had your own insurance and your rate we agreed upon was for Contractor Services Rate with insurance." (Cl. Ex. 19, p. 7) Mr. Oliveira asked the claimant to turn in his W-9 form in order to be paid. Claimant did so on August 5, 2012, and included an invoice from Martin Construction Services, Inc. for $292.50. He signed the email with a signature line of Martin Construction Services, Inc. (Def. Ex. A)

On August 2, 2012, claimant also filled out paperwork to see Dr. Pape at Physicians' Clinic of Iowa. Mr. Martin indicated in this paperwork that the injury was not a work injury and that there was no accident. (Def. Ex. G, p. 1) His wife, Dawn Martin, listed claimant's employment as a "self-employed contractor." (Def. Ex. G, p. 2) She also indicated that he did have an accident while working. (Def. Ex. G, p. 2)

Dr. Pape diagnosed comminuted left calcaneus fracture and performed surgery on claimant's left foot and ankle on August 20, 2012. (Cl. Ex. 6) The surgery was unsuccessful. Mr. Martin next received care through the University of Iowa Hospitals

and Clinics. Phinit Phisitkul, M.D., provided evaluation and treatment which resulted in a second surgery on May 13, 2013. (Cl. Ex. 8) This surgery removed the screws from his foot and fused his left ankle to provide better stability. The nerve in his left leg was also deadened in order to relieve pain. (Cl. Exs. 8-10) He has a rod in his left leg to help provide stability.

On July 14, 2014, Mr. Martin filed a pro se petition with the Iowa Workers' Compensation Commissioner for this injury. He attached a lengthy typed statement concerning his employment relationship with Prestige Properties. (Cl. Ex. 19, pp. 3-6)

Mr. Martin reached maximum medical improvement from this injury on October 7, 2014. (Cl. Ex. 13, p. 1) Dr. Phisitkul performed a thorough assessment of claimant's left foot, ankle and leg and determined claimant has a loss of function of his left leg of 27 percent. (Cl. Ex. 13A, p. 2) He suggested some restrictions and recommended a functional capacity evaluation, which Mr. Martin received on February 18, 2015. His physical restrictions related to his injury are quite severe. (Cl. Ex. 14, p. 5) The FCE recommended he avoid frequent or constant lifting. It recommended only occasional walking, bending, and stair climbing. It recommended rarely standing, squatting and kneeling and it advised against crawling altogether. (Cl. Ex. 14, p. 5) Claimant wears a prosthetic device to stabilize his left foot and leg.

The claimant testified that he has gait derangement and, as a result, he has developed back and hip pain. At this time, these claims are not developed significantly in the medical reports. Dr. Phisitkul and Chad Abernathey, M.D., have provided reports which dispute this. (Cl. Ex. 13, p. 2; Def. Ex. E) At the time of hearing, the greater weight of the evidence supports the finding that the disability is confined to the left leg, ankle and foot.

CONCLUSIONS OF LAW

The ultimate question in this case is whether the claimant is covered under the Workers' Compensation Act.

Section 85.61(11) provides in part:

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

It is claimant's initial burden to demonstrate, by a preponderance of the evidence, that claimant 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. In essence, once a claimant asserts, with sufficient evidence, that he was an employee, there is a rebuttable presumption that he was an employee. The defendants must establish, by a preponderance of the evidence, any pleaded affirmative defense or bar to compensation. Nelson v. Cities

Service 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. 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. Id.

Factors used to determine whether an independent contractor relationship exists are: (1) The existence of a contract for the performance of a certain piece or kind of work that affects price. (2) Whether the worker has a separate business apart from the work he is performing for the employee. (3) The employment of assistants and the right to supervise their activities. (4) The obligation of the worker to furnish necessary tools, supplies, and materials. (5) The right of the worker to control the progress of the work, except as to the finished result. (6) The method of payment, whether by time or by job. (7) The intention of the parties to create a particular relationship. Crane v. Meier, 332 N.W.2d 344 (Iowa App. 1982).

There are a number of factors which make this a difficult case to decide. First, the claimant was, in fact, a skilled contractor who had run his own construction businesses for most of his working life. At the time of his injury he had not dissolved these businesses. He was capable of working as a contractor. Second, the parties completed no paperwork or formalized, documented agreement prior to the commencement of the work on July 27, 2012. There is no formal documentation of the agreement between the parties whatsoever, nor are there any witnesses with first-hand knowledge.

Utilizing the legal framework set forth above, I find that the claimant presented sufficient evidence that he was hired as an employee. This shifts the burden to the defendants to prove that claimant is an independent contractor. The claimant testified that he was hired as an at-will employee. There is no question that Prestige was under pressure to complete siding work on their building quickly. Specifically, Mr. Martin testified that on July 26, 2012, he told Mike Oliveira that he was not equipped to work as an independent contractor at the time. He had not renewed his insurance. This fact was confirmed by Mrs. Martin, who helped run the business. It is further supported generally by the business records submitted by the Martins, notwithstanding the arguments of defendants.

Furthermore, Prestige Properties concedes that it allowed the claimant to start working without submitting a bid or entering a written contract. While the defendants contend that claimant was told he would have to provide a W-9 and proof of insurance, no such documents were required before he started working. As such, Mr. Martin showed up for work in the afternoon of July 27, 2012, and began working at the

direction of the Prestige's maintenance supervisor. With no contract, had Prestige terminated him that day, he would have had no recourse. He used their materials and was being paid by the hour. Importantly, he had never even seen the work in order to do a bid or cost out the project. He just showed up and began working under the general direction of the maintenance supervisor. Prestige appeared to have complete control over his work. Evaluating these facts under the direction and control factors in Nelson, I find that the claimant has met his initial burden of proof that he was an employee. The burden consequently shifts to the defendants to prove he was an independent contractor.

I find that the defendants have failed to meet their burden that the claimant was, in fact, an independent contractor. For the reasons set forth above, this is a debatable case. The absence of any evidence of the intent or the agreement prior to the injury allows both sides to argue the position which is to their own benefit.

I find, however, that the absence of such evidence weighs quite heavily against Prestige. The reality is, had Prestige simply required Mr. Martin to provide proof of insurance and a W-9 form prior to starting work, this case would be relatively simple. Instead, Prestige allowed Mr. Martin to begin working with no documentation of the precise employment relationship. The defendants' own contention is that Mr. Martin appeared to work for an hourly wage without ever seeing, costing or bidding the work he was to perform. While he did use his own tools, the work was the type of work that Prestige would sometimes perform (maintenance work in its building) and all of the supplies were already owned and provided by Prestige. Since there was no written contract for the work to be performed, Prestige had a near absolute right to direct and control Mr. Martin's work. Had Mr. Martin been retained as a contractor, he presumably could have begun on Friday July 27, 2012, and worked through the weekend, but he did not have the right to control the progress of the work as he was dependent upon the maintenance supervisor providing him with the supplies. Virtually all of these factors lean against the finding that the claimant was retained as an independent contractor.

The best evidence submitted by the defendants is that Mr. Martin had, in fact, run his own business as a contractor for a number of years. He was certainly qualified to bid on a job such as this, enter into a written contract with Prestige and perform the siding work as a contractor. The defendants argue that because of the time constraints in getting this work completed, they cut corners to get the work started quickly. They allege, however, there was, in fact, a verbal agreement for the claimant to subcontract the work in question, which specifically required him to provide a W-9 and proof of insurance.

There are other factors which weigh in the favor of defendants as well. Claimant's business entities were not entirely shut down. Based upon the record before me, it appears that the work would only be temporary. The claimant also used his own tools, including the ladder he fell from. While the claimant was being paid by the hour, the hourly rate itself does seem somewhat high for an employee, although neither party presented evidence on the going rate for the appropriate hourly wage for skilled

carpentry work in the area. After the injury occurred, the claimant did ultimately fill out a W-9 and submit an invoice for payment of 6.5 hours under the name Martin Construction Services. Mrs. Martin also filled out paperwork for the medical provider listing the claimant's occupation as "self-employed contractor." These factors make the defense presented by Prestige plausible.

Prestige argues that all of these factors, combined with Mr. Oliveira's testimony about the verbal contract agreed on July 26, 2012, allow the defendants to meet their burden. As stated above, Prestige's failure to secure the documentation of the precise agreement prior to Mr. Martin commencing work, weighs heavily against the defendants. Nevertheless, even with all the factors set forth above, the defense of Prestige rests heavily upon the credibility of its general manager, Mike Oliveira. Mr. Oliveira is asking this agency to believe that Mr. Martin and his wife are lying about the agreement they entered into. The importance of this conversation cannot be understated. Mr. Oliveira testified that there was a clear agreement for claimant to subcontract the work, while Mr. Martin testified that he clearly told Mr. Oliveira that he was not set up as a contractor at that time. When viewing this entire record as a whole, I find that the testimony of Christopher and Dawn Martin is more credible than the testimony of Mike Oliveira.

Specifically, Mr. Oliveira contended that he met with Mr. Martin on the morning of July 27, 2012, prior to his commencement of work. (Tr., p. 227) Mr. Martin denied this meeting took place. He testified that he needed to make arrangements for the care of his dependent son. (Tr., pp. 254-61) This testimony is verified by his phone records which show that he was in Cedar Rapids for virtually the entire morning on July 27, 2012. (Cl. Ex. 23) It is further verified by his invoice work record which demonstrates that he had only worked 6.5 hours total, prior to being injured. (Def. Ex. B) Had claimant begun work shortly after 9:00 a.m. on July 27, 2012, he undoubtedly would have worked more than 6.5 hours prior to his injury. Prestige's accountant, Ms. Shen did testify that she believed she had provided claimant with a W-9 at some point, but she did not actually support Mr. Oliveira's contention that the three of them had met the morning of July 27, 2012. The reality is, Prestige did nothing to document the nature of the work relationship until after the claimant had been injured.

For all of these reasons, I find that the defendants have failed to meet their burden to prove that an independent contractor relationship existed with Mr. Martin. As such, I find that there was an employment relationship between the parties on July 30, 2012.

The next issue is whether claimant suffered an injury which arose out of and in the course of employment on July 30, 2012.

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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

I find that the claimant suffered an injury which arose out of and in the course of his employment on July 30, 2012, when he fell from a ladder while in the employment of Prestige Properties. The defendants only real defense to this injury was that claimant was an independent contractor when the injury occurred. Since that defense failed for the reasons set forth above and herein, the defendants are responsible for the injury.

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); Dunlavey 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).

The disability that claimant suffered to his left leg and foot is causally connected to the work injury, based upon the opinions of the treating physician, Dr. Phisitkul. The defendants are therefore responsible for the medical expenses, healing period and permanency associated with his condition.

The next issue is whether the claimant is entitled to healing period benefits.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

I find that claimant is entitled to healing period benefits from July 30, 2012, through October 7, 2014, the date he reached maximum medical improvement per his treating physician, Dr. Phisitkul.

The next issue is the nature and extent of claimant's disability.

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).

Since the location of the disability is his left leg, the compensation is dictated by Iowa Code section 85.34(2)(0) (2015). The benefits are capped and calculated as a percentage of 220 weeks.

Claimant argues that his condition extends into his body as a whole based upon his testimony of gait issues, and pain in his hip and low back. The medical evidence, however, does not support these contentions at this time.

I find that claimant has suffered a 27 percent loss of use of his left leg as set forth by Dr. Phisitkul, his treating surgeon. (Cl. Ex. 13A) This entitles claimant to 59.4 weeks of benefits commencing upon the termination of healing period benefits.

The next issue is medical expenses. Claimant seeks medical expenses as outlined in Claimant's Exhibit 22.

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. Iowa Code section 85.27 (2015).

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

I have thoroughly reviewed Claimant's Exhibit 22. It appears all of these expenses are causally related to claimant's work injury. Defendants are responsible for these bills.

The final issue is rate, and more specifically, the claimant's average weekly wage.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

Under section 85.36(7), the gross weekly earnings of an employee who has worked for the employer for less than the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings of other similarly situated employees employed over that full period, but if earnings of similar employees cannot

be determined, by averaging the employee's weekly earnings computed for the number of weeks that the employee has been in the employ of the employer.

Mr. Martin had only worked for this employer for a few hours before the injury occurred. He argued that since he did not have the requisite quarter of work available, he should be calculated upon the basis of the customary hours an employee would work. Once claimant was injured, defendants retained Andrew Skola to complete the work in question. He worked an additional 39.5 hours to complete the work. (Cl. Ex. 30) I find that claimant was essentially a full-time temporary employee and I accept his calculation of average wage. Having found that claimant's gross earnings were $1,800.00 per week and being married with 5 exemptions, the claimant's rate of compensation is $1,112.49 per week.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant healing period benefits commencing on the date of injury through the date he reached maximum medical improvement (October 7, 2014) at the rate of one thousand one hundred and twelve and 49/100 ($1,112.49) per week.

Defendants shall pay one hundred and ten (110) weeks of permanent partial disability benefits at the rate of one thousand one hundred and twelve and 49/100 ($1,112.49) per week commencing upon the completion of healing period, October 8, 2014.

Defendants shall pay accrued weekly benefits in a lump sum.

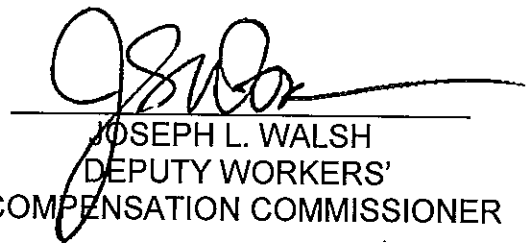
Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall pay medical expenses as outlined in Claimant's Exhibit 22, in the amount of two hundred twenty-two thousand one hundred twelve and 55/100 ($222,112.55). Claimant is entitled to ongoing, lifetime medical care for this injury.

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

Costs are taxed to defendants.

Signed and filed this 28th day of March, 2017.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Raymond R. Stefani II
Attorney at Law
PO Box 456
Cedar Rapids, IA 52406-0456
rstefaniii@gsmlawyers.com

Peter J. Thill
Attorney at Law
1900 54th St.
Davenport, IA 52807
pjt@bettylawfirm.com

JLW/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.