BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MATTHEW COYLE,

Claimant,

vs.

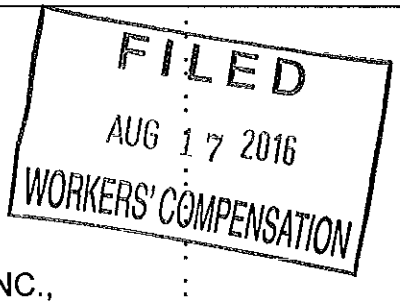
NORTH END WRECKING, INC.,

Employer,

and

COMMERCE & INDUSTRY INSURANCE CO.,

Insurance Carrier,
Defendants.



File No. 5051037

ARBITRATION

DECISION

Head Note Nos.: 1400, 1803.1, 3000

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Matthew Coyle, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on September 22, 2014. Claimant alleged he sustained a work-related injury on September 2, 2014. (Original notice and petition.)

North End Wrecking, Inc., is located in Dubuque, Iowa. For purposes of workers' compensation, the employer is insured by Commerce and Industry Insurance Co. A first report of injury was filed on September 19, 2014.

The hearing administrator scheduled the case for hearing on May 9, 2016. The hearing took place in Cedar Rapids, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Angela Maddux as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants called Mr. Scott Kunde, part owner of North End Wrecking, Inc.

The parties offered joint exhibits only. They offered exhibits marked A through J. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on June 7, 2016. The case was deemed fully submitted on that date.

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 an injury on September 2, 2014 which arose out of and in the course of his employment;

3. The injury is a cause of both temporary and permanent disability;

4. Temporary benefits are no longer at issue;

5. The parties agree claimant reached maximum medical improvement on October 20, 2014;

6. Defendants have waived all affirmative defenses they may have had available to them;

7. Medical benefits are not an issue;

8. Prior to the hearing, defendants paid 78.429 weeks of permanent partial disability benefits to claimant at the rate of $284.33 per week;

9. The parties agree certain costs that are detailed were paid by claimant and are not in dispute.

ISSUES

The issues presented are:

1. There is an issue as to the nature of permanent partial disability to which claimant is entitled;

2. There is an issue as to the extent of permanent partial disability to which claimant is entitled; and

3. There is an issue as to the weekly benefit rate to be paid to claimant: defendant maintains claimant is single with one exemption and a benefit rate of $284.22; claimant says the rate is single with one exemption and the weekly benefit rate is $402.02 per week.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant at hearing, and after listening to the testimony of Mr. Kunde, after judging the credibility of the two individuals, 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 now 35 years old and right hand dominant. On the date of his work injury he was single. North End Wrecking, Inc., hired claimant as a dismantler on Monday, August 18, 2014. A description of a dismantler is detailed in Exhibit B. The description is:

> Dismantler:
>
> This is an indoor job where the person will be working 40 hour weeks from 8 am to 5 pm dismantling vehicles.
>
> As a dismantler you will be pulling engines, transmission, and suspension parts. The vehicles you receive will be damaged or disabled with a lot of very useable parts that people are looking for daily. One must have the correct tools to dismantle vehicles properly.

(Exhibit, B)

On September 2, 2014, claimant was in the process of removing an engine from a vehicle. Claimant was required to remove the mounting bolts first so the chain attached to the mounts could lift the engine out of the vehicle. Claimant attempted to remove the engine before the disconnection process was concluded. As claimant was lifting the engine, the chain broke and landed on claimant's left thumb.

Claimant was transported to Finley Hospital in Dubuque, IA. David S. Field, M.D., performed a traumatic amputation of the left thumb at the level of the proximal portion of the proximal phalanx. (Ex. A, p.1) Claimant tolerated the procedure and was transported to the recovery room in good condition. It was determined re-implantation of the thumb was not a viable option. (Ex. A, p.2)

Claimant engaged in follow-up care with Dr. Field. Claimant was returned to one-handed work on or about October 6, 2014. (Ex. A, p. 5) On October 27, 2014, Dr. Field examined claimant. The orthopedic surgeon wrote the following in his clinical notes for the same date:

> He [claimant] has done well. He doesn't seem to have any significant neuritic complaints. He does not have any phantom pain. He has had no problems with healing. He does have slight sensitivity along the radial

> side of the thumb; possibly the radial digital nerve has some sensitivity. He is going to Iowa City to see if any other options are available for him at this time.

(Ex. B, p. 9)

On November 12, 2014, claimant presented to the University of Iowa Hospitals and Clinics. Shah S. Apruva, M.D., examined claimant's left thumb amputation. (Ex. A, p. 11) Dr. Apruva made three recommendations to claimant with respect to the left thumb amputation. The recommendations were:

> In regards to regaining his ability to restore thumb length and restore some pinch to help him with his occupation, we offered him 3 options. The first was an index to thumb transfer. The second is toe to thumb transfer, and the last is distraction osteogenesis to lengthen the metacarpal and deepen the first webspace. He seems to be leaning towards the last option. We educated him about the process and he understands that he will be out of work for that period of distraction and consolidation. He will see us back in 6 weeks, at which time he will think over his options and he will come back with a final decision. Regarding his neuro sensitivity of his digital nerve, will continue to monitor it for now and see how he does in the next 6 weeks. He will be working full-time in the same occupation without restrictions, even though he is half as productive. He will also consider some long-term occupation changes if possible from his end. In the future as well, we might have him see the occupational therapist who would work on some modification on the tools that he uses to perform his side job, which is working with plaster.

(Ex. A, p. 12) Claimant did not select any of the three options.

On Friday, November 14, 2014, claimant and another employee, engaged in a verbal altercation over cleaning duties in the shop. Some verbal threats were made and claimant voluntarily terminated his employment with North End Wrecking.

On August 17, 2015, Dr. Field evaluated claimant's left thumb condition. Dr. Field opined:

> For the purpose of evaluation of impairment using the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition using Table 16-4, page 440, using that guide it is apparent he has a 100% amputation essentially of his thumb, which equates to 40% hand impairment, or 36% upper extremity impairment, and therefore a 22% whole person impairment due to the nature of this traumatic injury. However, it should be noted that other surgical options are possible for reconstruction of his thumb. He has declined those at the present time, but it <u>should be</u> incorporated into potential settlement evaluation, as surgeries to give him more mobilization

> of the thumb could well be in his best interest in the future. Any surgical procedure that is possible should be incorporated in terms of future management and future expenses that could occur relative to his hand and thumb injuries.

(Ex. A, p.14)

Subsequent to his voluntary termination from North End Wrecking, claimant spent five months engaged in the dry wall business. On April 21, 2015, claimant's significant other gave birth to the couple's daughter. Since then, claimant has been a stay-at-home father. He has full child care responsibilities for his daughter while his partner works outside the home.

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).

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).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995).

Claimant's work injury is confined to the thumb. There is absolutely no medical evidence to support the conclusion; the injury extends beyond the thumb or because of after effects or change, there is a permanent impairment to the body as a whole. Claimant did not have issues with phantom pain. There was no diagnosis of depression or conditions such as post-traumatic stress disorder. Claimant is taking no medication for any mental condition. He is not under the care of any doctor or psychologist. As a result, claimant's work injury is to be calculated pursuant to Iowa Code section 85.34(2)(a.). The subsection provides a loss of a thumb shall be compensated during 60 weeks.

Dr. Field provided a 100 percent loss of use of the thumb. Claimant is entitled to sixty (60) weeks of permanent partial disability benefits commencing from October 20, 2014. Defendants shall take credit for all benefits previously paid.

The next issue to resolve is the matter of the proper weekly benefit rate to use. 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.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings are excluded and replaced by earlier representative weeks. Section 85.36(6).

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

Claimant was paid by North End Wrecking, Inc., on an hourly basis during the first week and by output during the second week. Therefore, the applicable basis of computation of his rate is found under Iowa Code section 85.36(6). The sub-section provides in instances of hourly or commissioned pay, "the weekly earnings shall be computed by dividing by thirteen the earnings ... of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks

immediately preceding the injury." See Iowa Code section 85.36 (6). Weeks which do not fairly reflect the employee's customary weekly earnings are excluded and replaced by early representative weeks.

As indicated above, claimant commenced his employment on Monday, August 18, 2014 and the injury occurred on September 2, 2014. Only two full weeks were available for computation. Iowa Code section 85.36(7) provides an alternative means for computing the weekly benefit rate in situations such as this, the employee has been employed for less than 13 weeks prior to the date of the work injury. The subsection provides:

> [T]he employee's weekly earnings shall be computed under subsection 6 . . . for such purpose to be the amount the employee would have earned had the employee been so employed by the employer and the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. If the earnings of other employees cannot be determined, the employee's weekly earnings shall be the average computed for the weeks the employee has been in the employ of the employer.

Iowa Code section 85.36(7).

Previous to claimant's employment with North End Wrecking, Inc., the position had been vacant since July 5, 2014. (Ex. H) According to exhibit H, the previous employees who occupied the position had selected to be compensated at an hourly rate. (Ex. H) If those calculations had been employed, the average weekly wage for claimant would have been less than what was used for claimant. (Ex. H) As a consequence, defendants took the average of claimant's two weeks of employment to use to calculate the weekly benefit rate.

During claimant's initial week of employment, he worked 40 hours at a rate of $10.00 per hour. (Ex. C, p. 16) During the second week, claimant decided to work on a piece work basis. He earned $490.00 in gross wages. (Ex. C, p. 17) When the two weeks are added and divided by two, the average gross earnings equate to $445.00 per week. Claimant was single with no dependents on the date of the work injury. His applicable workers' compensation rate is $284.33.

The final issue is costs to litigate. 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). It is the determination of this deputy; each party shall pay his/their own costs to litigate this claim.

ORDER

THEREFORE, IT IS ORDERED:

Claimant is entitled to sixty (60) weeks of permanent partial disability benefits for the left thumb at the weekly rate of two hundred eighty-four and 33/100 dollars ($284.33).

Prior to the date of the hearing, defendants paid sixty (60) weeks of permanent partial disability benefits at the rate of two hundred eighty-four and 33/100 dollars ($284.33) per week.

Defendants shall take credit for all benefits previously paid, including all healing period benefits paid.

Each party shall pay his/their own costs to litigate the claim.

Defendants shall file all reports as required by this division.

Signed and filed this 17th day of August, 2016.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Nathan D. Runde
2080 Southpark Court
Dubuque, IA 52003
walters@cwcmlaw.com

John E. Swanson
Attorney at Law
5th Floor, US Bank Bldg.
520 Walnut St.
Des Moines, IA 50309-4119
jswanson@hmrlawfirm.com

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.