BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PHILLIP AHRENS, Claimant, vs. EARWOOD FAMILY PROPERTIES, LLC, Employer, and UNINSURED, Insurance Carrier, Defendants.	:	File No. 5066611 ARBITRATION DECISION Head Note Nos.: 1100, 1402.10, 1800, 1801.1, 1803, 2500

STATEMENT OF THE CASE

Claimant, Phillip Ahrens, has filed a petition for arbitration seeking worker's compensation benefits against Earwood Family Properties, Inc., employer. It is defendant's position that it is not required to have workers' compensation insurance.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on September 8, 2020, and considered fully submitted on September 29, 2020.

The record consists of Joint Exhibits 1 through 3 and Claimant's Exhibits 1-5 , Defendants Exhibit A, B, and D. Exhibit C was excluded. Testimony was received from claimant, Ben Earwood, Jose Arroyo, Marlin Mann, and Eli Shetler.

On September 4, 2020, claimant filed a motion to amend the petition to add a claim for penalty benefits. On September 8, 2020, defendant filed a resistance arguing that they would be prejudiced by the late amendment. Defendants further asserted that a bifurcation of the issue would not be appropriate. The case had no written discovery and no depositions were taken.

The issue of penalty was not considered during the hearing as it was deemed unfairly prejudicial to the defendant who had not prepared for the late pled claim.

Iowa Administrative Code rule 876 IAC 4.35 makes Iowa Rule of Civil Procedure 1.402(4) applicable to amendments of pleadings before this agency.

Rule 1.402(4) of the Iowa R. Civ. P. provides:

> 1.402(4) Amendments. A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

The Iowa Supreme Court repeatedly has held that allowing an amendment to a pleading is the rule; denial is the exception. Galbraith v. George, 217 N.W.2d 598 (Iowa 1974). Considerable discretion is allowed in determining whether or not leave to amend should be granted. Ackerman v. Lauver, 242 N.W.2d 342 (Iowa 1976).

Ultimately the question is whether the allowance of a late pled penalty claim is unduly prejudicial to the defendant. In this case, it is not. Penalty claims are often bifurcated from the initial hearing and discovery pertaining to penalty is not allowed until the underlying matters are decided. See IAC 876-4.2(86)

Defendants argue that Thomas-Wilson v. UFP Technologies, Inc., File No. 5057149 (Arb. January 26, 2018) precludes allowance of bifurcation in the case at hand. However, this matter is factually different. In Thomas-Wilson, the claimant did not include penalty as an issue in the original petition and it was not raised until the post-hearing brief after the close of evidence. In this case, the claimant moved to add penalty before the hearing.

While the claimant or petitioner may only bifurcate before the case is assigned for hearing, the agency holds the right to bifurcate matters at any time. The first sentence of IAC 876-4.2(86) states, “A person presiding over a contested case proceeding in a workers' compensation matter may conduct a separate evidentiary hearing for determination of any issue in the contested case proceeding which goes to the whole or any material part of the case.”

In Keiper v. Quaker Oats Company, File No. 5060842 (Ruling File No. 5060842), the claimant was permitted to file an amendment to the petition to add penalty on January 7, 2019, before a January 14, 2019, hearing. The penalty issue was bifurcated and set for hearing at a later date.

In keeping with the Supreme Court’s directive to allow amendments when possible, the claimant’s motion to amend the petition to add penalty is granted. The penalty claim shall be heard at a later date in front of the undersigned.

ISSUES

1. Whether claimant was an employee at the time of his alleged injury;
2. Whether he sustained an injury arising out of and in the course of his employment, and if so, the nature and extent of that injury;
3. Whether claimant is entitled to temporary or healing period benefits; (October 31, 2018, to December 6, 2018)
4. Whether claimant is entitled to permanent benefits;
5. Whether claimant is entitled to reimbursement of medical expenses itemized in Claimant's Exhibit 2;
6. Whether claimant is entitled to an assessment of costs.

STIPULATIONS

The parties agree that if the injury is found to be the cause of a permanent disability, the disability is a scheduled member disability limited to the little finger and compensable under Iowa Code section 85.34(2)(d). The commencement date for permanent partial disability benefits, if any are awarded, is December 7, 2018.

At the time of the alleged injury, the claimant's gross earnings were $492.00 per week. He was single and entitled to two exemptions. Based on the foregoing, the weekly benefit rate is $328.94.

FINDINGS OF FACT

At the time of the hearing, claimant, Philip Ahrens, was a 30-year-old person. He graduated from high school in 2008 and had some postsecondary education with no degree. Claimant's past work history includes construction and mixed martial arts coaching and competition.

At one point he worked for a gentleman by the name of Les Simmons doing roofing work. He did not keep track of his hours but was paid by the job for the work completed. The major dispute in this case is whether claimant was an employee of the defendant. The questions asked of the claimant pertaining to his past work history included questions about whether he considered himself self-employed at various times or an employee of a particular employer. For instance, when asked about his kickboxing or jujitsu classes, claimant testified that he did not consider himself to be self-employed but was paid by the class he conducted. However, he identified himself as self-employed on his Facebook page.

Defendant Earwood Family Properties is a real estate holding company owned by Ben Earwood and his brother, Chad, who lives in Kansas City. Ben Earwood is the manager and has day to day control over its operations. The business was started in 2013 to own and renovate real estate properties. In management terms, the company refers to its assets as doors to identify the number of properties it manages. For instance, an apartment complex may have 12 doors. At the time of the hearing, defendant owned approximately 60 doors or around 20 properties with 63 tenants.

Defendant retains the services of a property manager who lives on site. She is paid a percentage of the rental income once a month after the rents are collected. Part of her duties include contracting with the tenants. Mr. Earwood testified that every person who works for the company is a 1099 contractor. The majority of the people whose services he uses are paid by the hour although some contractors are paid by square foot of siding or roofing.

These workers are tracked via timesheets and are given two days of paid holidays which Mr. Earwood refers to as "God" and "country." Workers are paid for July 4th, and Christmas Day despite not working on those days. Defendant has never paid employment tax or unemployment on the six to ten workers paid on an hourly rate. Ben Earwood claims, not credibly, that this is not a cost saving technique. (Tr. p. 101) He even claimed that if he paid wages with appropriate deductions for taxes, the workers would take home less but they would still work for him. (Tr. p. 101) He sets defendant forth solely as a real estate holding company rather than a company that is actively involved in the acquisition, renovation, and management of several properties. There were no contracts in place prior to the claimant's work for defendant employer. Those were instituted a few months before trial.

In regards to the defendant, claimant had been introduced to Ben Earwood by a worker named Matt Wadlow. Claimant was hired on a trial basis to determine how much he would be paid. Initially he was paid $10.00 per hour, but after the first week his pay was increased to $14.00 per hour. In the defendant's brief, it was argued that claimant was paid time and material; however, the testimony does not support this. Claimant did not have the money to pay for materials. He did not have the money to pay for tools. He testified that he owned a tool belt, a hammer and some other tools that had been gifted to him over the years. None of the pages in the transcript to which defendant cites (Tr. pp. 26, 93-94, 98) state that claimant paid for materials. Ben Earwood testified that "all of our contractors are time and material" but goes on to admit that Earwood maintains accounts at Lowe's and K&K which the employees use to charge materials and tools against. "I've always purchased the material for the contractors," Mr. Earwood stated. (Tr. p. 98) He also goes on to state that if the employee cannot afford a $200 set of tools when his breaks or maybe he can't afford $50,000.00 in decking material, Mr. Earwood would then "loan that money." (Tr. p. 98) It is not credible to believe that a sophisticated businessman such as Mr. Earwood would lend $50,000.00 to a person he hired at $10.00 an hour. Claimant did not testify that he was paid time and material. It is found claimant was paid an hourly wage that started at $10.00 and was increased after claimant's trial period.

When it came to the jobs, client was directed to the property by either Mr. Earwood or a representative of his. Claimant used an application to clock in and out and his pay was based upon the hours that he logged. (Ex 3:10-17) The form denoted claimant as an employee. (Ex 3:10) It was typical for the claimant to move from property to property as projects were completed or materials had yet to arrive. He would move to different properties based upon the direction of Ben. In regards to the "God and

country" pay, claimant received a check for but was not working during the Christmas season.

He averaged between 30 to 50 hours per week. At a minimum, he would work 25 hours per week. He was told that he could work as many hours as he wanted or as few. Defendant also had company T-shirts given to each worker. Mr. Earwood testified that these were promotional items.

There was some dispute between the claimant and the defendant as to who owned the tools claimant used while working for the defendant. I find the more credible testimony comes from the claimant. Both the defendant and the claimant testified that claimant purchased a DeWalt cordless power toolkit using the defendant's money. Later, there was some confusion as to whether claimant would repay the defendant for the purchase of the power tools but ultimately no repayment was required of him. Claimant testified that there were tools at the job site that were engraved or marked with the defendant's initials on it. Initially, Mr. Earwood claimed that it was Matt Wadlow that bought an engraver but didn't know "if he took it out of the box." (Tr. p. 97) However, earlier, he let slip that "I had Earwood on a bunch of them for sure, because they were my personal tools." (Tr. p. 96)

Claimant testified that the tools were stored in a property on 13th Street, a specific location which the defendant agreed he owned. Defendant denied storing tools, however, but admitted that Earwood did have a pick, a drywall lift, and ladders. (Tr. p. 96) These factors support the claimant's testimony that the tools that he used were supplied by the defendant including ladders, drills, hammers, and other power tools.

This particular exchange was one of the reasons Ben Earwood is deemed to have low credibility. He started out disclaiming owning any tools "So I don't currently own any personal tools, any company tools… He talked about 13th Street. Phil was spot on. We'd have—not tools. He's incorrect there. It's more scaffolds we would keep at 13th Street. But products that we might use somewhere, but not tools really. There might be something in there, but not—we're not storing tools anywhere, because we don't own any." (Tr. p. 96) He then further testified, "We—we would own a scaffold probably. And we probably maybe had something, a drywall lift, a pick. He's probably correct. We probably had a pick. Probably still have the pick. Ladders. I'm guessing we have ladders, I'm guessing." (Tr. p. 96-97) When asked whether the hourly workers would use the equipment, he stated, "Maybe. I don't think so. They do sometimes. They do what's in 13th. But I don't think there's any ladders at 13th. They've all got their own vehicles, ladder racks. So, yeah, there are tools down there." (Tr. p. 97)

During testimony, particularly cross examination, he was evasive, parsing language and nitpicking words, and then later shifting and changing testimony. Mr. Earwood is not an unsophisticated individual but a businessman who owns and manages over twenty properties. The above quoted testimony is but a sampling of his evasive, shifting answers. It is found Mr. Earwood is not credible.

Claimant worked at the direction of the defendant, using the materials that were on site. He often worked with Matt Wadlow, the person who introduced him to Mr. Earwood. Claimant was paid one holiday. If the work he performed did not meet Earwood's approval, the work would need to be redone and he would be paid for that additional work as well. (Tr. p. 95)

Claimant did not hire any assistants and did not believe that that was an option. However, José Arroyo testified that he would retain the services of an assistant from time to time and pay that assistant out of the monies he would receive from the defendant. Ben Earwood testified that claimant could have hired an assistant to perform the work if claimant desired, however, the payroll would go through him. "Like, I'd have to pay them, which is the agreement I have with the guy that paints and another gentleman." (Trans p. 114) The painter, Jose Arroyo, testified to the contrary. Mr. Arroyo testified on behalf of the defendant. He testified he has one employee and that he pays that employee from the funds that Mr. Earwood remits to Mr. Arroyo. Mr. Arroyo is paid by the job and he pays his employee $10.00 per hour. He does not require his assistant to clock in and out or use a timesheet.

Marlin Mann is a laborer who works on projects such as siding, flooring and remodel for defendant. He testified he is paid by the job. Specifically, he submits bids and when the bids are accepted, he is paid for that bid. When he first started working, he was paid time and material. He does not believe he is an employee of defendant. He pays taxes on his income and has brought in his own employees to work on a job with him. These employees were not approved by Mr. Earwood and were not paid by Mr. Earwood. Mr. Mann would compensate those individuals directly.

Stefan Shuttler also testified on behalf of the defendant. He was paid for his time and the material that he used. Mr. Shuttler would buy all the materials necessary for a job, report his time, and file his own taxes. He set his own hours and would take vacations when he wanted. No one was in charge of his progress or oversaw his work. He had all his own tools. He understood that if someone needed a tool, they could purchase it with defendant's money and then would need to repay them. Mr. Shuttler is now paid $100.00 per job regardless of the work he performs or how many hours he works.

Mr. Earwood agreed that he makes all the major project plans, that he has the final say in the work performed, has the right to reject the work performed, maintains the schedule of the work performed, requires timesheets to be filled out and was critical of claimant for possibly fudging the time where claimant clocked in and out.

The 1099 that is included in Exhibit D was never provided to the claimant prior to his injury but was sent out on January 8, 2019, after claimant's injury. Mr. Earwood testified that he had discussion with claimant about setting up an LLC so claimant could write off the miles that he drove to and from projects. No overtime was paid. Claimant agreed that the two had a discussion about claimant becoming an independent contractor. According to the claimant, one of the other employees brought up that Mr. Earwood was going to starting issuing 1099s because he had "too many properties to

stay under the radar" but that he promised to provide insurance to the workers. Workers objected because they had been evading taxes as well.

On October 31, 2018, claimant was finishing a deck by himself. He was ripping the boards longitudinally when he hit a knot in the wood. The saw blade jumped and traveled up his hand. According to the medical records he suffered a large laceration between the fourth and fifth digits extending into the dorsal hand. (Joint Exhibit 1:4) X-rays revealed an oblique comminuted fracture through the mid and distal portions of the little finger proximal phalanx, with significant displacement and rotation of several fracture fragments. (JE 1:7) Surgery was performed on October 31, 2018 with an attempt to repair the fractures. (JE 1:11; JE 2:27) On November 8, 2018, claimant presented to the ER for dressing change of the hand laceration and a request for pain medications. (JE 1:20) His bandages were removed and he was given a soft cast with instructions to follow up with orthopedics. (JE 1:23)

On November 9, 2018, claimant was seen at ORA Orthopedics for further care and treatment following the surgery. (JE 2:31) Claimant had pain in the left small finger which he rated six to seven on a ten scale. Id. He had sensation to light touch on the small finger, no DIP joint active flexion and some limited PIP joint motion. He was tender to palpation over the small finger proximal phalanx and the PIP joint of the small finger was unstable and very tender. (JE 2:33) Claimant and Tobia Mann, M.D., discussed either reconstruction of the joint or amputation. (JE 2:34) Together they agreed that amputation was the best course of action despite the fact that claimant would lose significant grip strength in his left hand. (JE 2:32, 36; 1:10) In the meantime, claimant went through therapy for desensitization and range of motion. (Ex 3: 40-53)

By December 6, 2020, claimant had returned to sparring and working out with no concerns other than the occasional phantom pain and slight hypersensitivity over the tip of the small finger stump. (JE 2:35) He was released to his regular activities as tolerated and advised to buddy tape his small finger stump to his ring finger. (JE 2:35) Claimant was also encouraged to do desensitization exercises. Id.

Claimant testified that typically the pinky supplies 30-75 percent of the grip in the hand and thus he has lost a significant amount of strength in the left hand. All the medical bills in evidence pertain to treatment related to the injury. No evidence was provided to the contrary.

Currently he has soreness and cramping in the wrist, less grip abilities in both duration and strength. He has some phantom pain but not significant. All activities from work to play are impaired.

He is working for East Moline Glass doing general laborer work including finishing work, caulking, installing angle iron, and other similar jobs. It is a 9-5 job and he is supposed to work eight hours a day. The company is lenient about the start and end time. He sets those hours himself. He uses some of his own tools on his current job.

CONCLUSIONS OF LAW

The threshold question here is whether claimant is an employee of defendant or an independent contractor.

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

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 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. 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 et al.,Counties, 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).

Defendant includes a citation to Martin v. Prestige Properties, LLC, File No. 5048828 (Appeal, October 31, 2018) wherein:

> While no one factor by itself is controlling or determinative, one of the most persuasive factors--if not the most persuasive factor--in determining whether an individual is an employee or independent contractor is 'the right to control the physical conduct of the person giving service.'"

Martin v. Prestige Properties, LLC, File No. 5048828 (Appeal, October 31, 2018) (citing Nelson, 146 N.W.2d at 265.)

The multi factorial test includes the following:

A) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price.

There was no formal written contract for the claimant. He was brought to Ben Earwood's attention by another contractor, Mark Wadlow. Claimant signed no papers but was issued a 1099 at the end of the year. Claimant was required to clock in and out using an app. Claimant was hired to do general laborer work in the construction field and was not paid for a certain piece or kind of work at a fixed price. Thus, this factor weighs in favor of an employer / employee relationship.

B) Independent nature of his business or his distinct calling.

Claimant has been in the construction business for over a decade, working off and on for a man by the name of Les Simmons. It does not appear that he has held a regular employee position in the construction industry prior to working for defendant employer. The other individuals who testified and were involved in the construction field testified that they were independent contractors who were paid by the job or for time and material. This factor weighs in favor of an independent contractor relationship.

C) His employment of assistants with the right to supervise their activities.

Claimant testified he did not hire assistants and was not aware that he could do this. Ben Earwood testified that he allowed this and would pay the assistant directly. There was a conflict between Ben Earwood's testimony and the way in which his other contracted workers would operate. Jose Arroyo employed an assistant and paid that employee out of his own remuneration from defendant. Marlin Mann also testified he paid assistants out of his own pocket. While defendant claims these other worker activities is proof of the independent nature of claimant's position within the defendant's company, it actually shows how different claimant was from the other independent contractors. Ben Earwood testified that he would pay claimant's assistant directly which would not make that new worker claimant's employee, but another worker employed by defendant. Claimant did not hire an assistant nor did he have the means to pay that individual as claimant was paid by the hour unlike the other three who testified. Claimant had a different payment structure and was required to clock in and out using an app. This factor weighs in favor of an employer/employee relationship as claimant's circumstances were different than the others.

D) His obligation to furnish necessary tools, supplies, and materials.

Ben Earwood's testimony contradicted and supported claimant's testimony in this. Mr. Earwood non credibly testified that he would loan a worker like claimant the money to pay for decking material so that the worker could be classified as a "time and

material" worker. He testified initially that he did not provide tools, but then a page later agreed that he did provide tools such as a pick or a ladder. Claimant did not have the funds to provide the tools, supplies or materials and used tools engraved with defendant's name on it. This factor weighs heavily in favor of the employer/employee relationship and also goes to show the extent by which Mr. Earwood was attempting to evade any employer responsibilities by not truthfully presenting the way in which he conducted his business.

Defendant argues that it was claimant who testified unpersuasively that there was a space located at 13th street that stored extra materials, a table saw, and ladders. However, based on the varying testimony of Mr. Earwood, it was claimant's testimony that was adopted rather than that of Mr. Earwood. Other than his tool belt and hammer, claimant used tools provided by defendant and used the materials provided by defendant. This factor weighs in favor of the employer/employee relationship.

E) His right to control the progress of the work, except as to final results.

Claimant was allowed to work at his own pace, clocking in and out each day. He did not have a supervisor but someone did check his work. He could take vacation when he wanted, show up to whatever project he wanted, and leave when he wanted. However, Mr. Earwood admitted that if the work was not up to his standard, he would have the work redone at the defendant's own cost. This factor is evenly weighted between the two possible employment scenarios.

F) The time for which the workman is employed.

Claimant's hours varied but he generally worked during the day between the hours of eight and five. He was required to keep track of his time by clocking in and out using a mobile app. These hours were monitored by the defendant who would contact claimant if Mr. Earwood believed claimant's logged hours were not an accurate representation of hours worked. This factor weighs in favor of an employee / employer relationship.

G) The method of payment, whether by time or by job.

Claimant was paid by the hour. Defendant has argued that claimant was paid by the project or by time and material but the evidence supports the previously made finding that claimant was an hourly employee. He was required to clock in and out using an app. He did not pay for any materials and could not even afford his own tools. He bought a set using the account of the defendant employer which claimant first understood he was to pay back but eventually did not have to. Other workers were paid by the job such as Jose Arroyo and Marlin Mann. Mr. Shetler was paid time and material and even had an agreement wherein he would be paid a set amount no matter what hours he worked, much like a retainer. None of these were the arrangement with the claimant.

Defendant included a definition of time and material in a footnote on page fifteen of the brief. According to the definition provided by defendant, time and material includes the actual cost of direct labor paid at a specified hourly rate, the actual cost of materials and equipment used, and an agreed upon fixed add-on to cover the contractor's overheads and profit. Claimant did not receive remuneration for the equipment he used nor did he receive a fixed add-on payment. Claimant's payments did not meet even defendant's own definition for time and material. Claimant was an hourly wage earner. Defendant also paid two holidays.

Thus, this factor weighs in favor of an employer / employee relationship.

H) Whether the work is the part of the regular business of the employer.

Defendant argues that Earwood Family Properties is a real estate holding company and not in the business of providing services for outside clients and thus cannot be said to be providing construction to third-party homeowners. This argument is not convincing. Defendant is the business of acquiring, renovating, renting and managing properties. The work claimant performed was part of the regular business of the employer. This factor weighs in favor of an employer/employee relationship.

I) Intent of the parties.

It is the intention of defendant to avoid employment obligations. It is true that the three individuals selected by defendant testified to their belief that they were independent contractors; however, the way in which defendant paid and treated those workers was different than how claimant was paid and treated. Claimant was paid by the hour. He had no assistants. He used tools and materials provided by defendant. He clocked in and out using an app which designated him as an employee.

He also worked as a part-time martial arts instructor although during the time he worked for defendant, he did work for no other company. Claimant choose self-employed as the status for his Facebook page. Mr. Earwood testified that he had a conversation with claimant regarding setting up an LLC to deduct his own expenses.

This weighs slightly in favor of the independent contractor status.

The above analysis provides a picture of a worker who used the defendant's tools, worked at the command of the defendant, stayed home on days that the defendant did not believe individuals should be working, reported his hours to the defendant daily via a mobile app, used the materials provided by the defendant, and was paid by the hour. Thus it is found claimant was an employee of the defendant at the time of his injury and entitled to workers' compensation benefits for medical expenses and disability causally connected to the work injury.

Claimant seeks temporary benefits from the date of his injury on October 31, 2018, to December 6, 2018. Defendant argues that there is no doctor who said claimant was not capable of working during that period of time. However, claimant had his small

finger sliced off and ultimately it was amputated. He had a cast and then underwent therapy. During that period of time, no work was offered to claimant from defendant and it is not likely claimant could have done laborer work with his small finger healing from this injury.

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

An employee has a temporary partial disability when because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). Temporary partial disability benefits are payable, in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and "shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of injury." Id.

As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Restaurants, Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556.

The evidence supports a finding claimant was not capable of returning to employment substantially similar to the construction or general laborer work until he was released on December 6, 2018. Thus, claimant is entitled to temporary benefits from October 31, 2018 through December 6, 2018.

Permanent Partial Disability

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2) (2016). If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund of Iowa v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995).

"The compensation allowed for a scheduled injury 'is definitely fixed according to the loss of use of the particular member.'" Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant's injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). "Functional disability is used to

determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury." Bergeson, 526 N.W.2d at 547.

Claimant's injury is to his hand. Dr. Mann noted that with the amputation claimant would lose significant grip and grip strength which is consistent with claimant's testimony. Thus, the injury extends from the small finger to the hand with the loss of grip and grip strength.

The schedule provides a maximum award of 190 weeks of permanent partial disability benefits for an injury to the hand. Iowa Code § 85.34(2)(e). No physician provided an impairment rating under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

According to Iowa Code § 85.34(2)(x), "when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity."

Defendant argues that the preceding statute requires a physician to provide an impairment because agency expertise is not to be utilized. However, there is no such language in the statute that requires a medical provider to set impairment. The statute requires that the permanent impairment shall be determined by utilizing the guides published by the AMA which is essentially a fact based assessment.

Claimant's finger was amputated above the carpometacarpal joint. He has some phantom pain and tenderness, loss of grip and grip strength but no measured loss of range of motion to the hand. An amputation of the little finger is a 10 percent impairment of the hand. Thus, claimant is entitled to nineteen weeks of permanent partial disability.

ORDER

THEREFORE, it is ordered:

That defendant is to pay unto claimant nineteen (19) weeks of permanent partial disability benefits at the rate of three hundred sixty-eight and 35/100 dollars ($328.94) per week from December 7, 2018.

That defendant is to pay unto claimant temporary benefits from October 31, 2018, through December 6, 2018.

That defendant shall pay medical expenses itemized in Exhibit 2.

That defendant shall pay accrued weekly benefits in a lump sum.

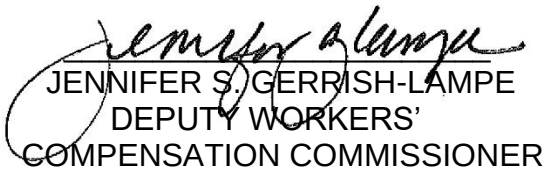
That defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

That the parties shall contact the hearing administrator within ten (10) business days of this ruling and schedule a hearing before the undersigned to take place within the next six months regarding the right of penalty benefits.

A copy of this decision is being provided to the workers' compensation commissioner to determine whether further action should take place under Iowa Code section 87.19 for failure to have workers' compensation insurance.

Signed and filed this __25th___ day of February, 2021.



JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Michelle Schneiderheinze (via WCES)

Michael Galvin (via WCES)

Paul Powers (via WCES)

Lori Scardina Utsinger (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.