BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERRANCE ADAMS,

Claimant,

vs.

M & D EXPEDITED, LLC, and ELVIS PAJAZETOVIC,

Employer,

and

UNINSURED,

Insurance Carrier,
Defendants.

File No. 5054637

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Terrence Adams, has filed a petition in arbitration and seeks worker's compensation benefits from M & D Expedited, Inc., and/or Elvis Pajazetovic, employer, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Waterloo, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the claimant was an employee on January 1, 2015;

2. Whether the claimant suffered an injury arising out of and in the course of employment on January 1, 2015;

3. Whether there is permanent disability from injury alleged to have arisen out of and in the course of employment on or about January 1, 2015, and if so, the extent;

4. Temporary benefits;

5. Medical Benefits;

6. Independent Medical Evaluation (IME); and

7. Corporate Veil.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

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

The claimant was 41 years old at the time of hearing. He is a high school graduate. He is a veteran with four years of service in the United States Marine Corps. He has a truck driving certificate and a CDL. Relevant past work history includes general laborer and roofer, driving a cab, four years working at a drug rehabilitation facility, and commercial trucker. He began the position relevant to this preceding in about October of 2014. When hired he was told he would be a corporate driver and would be provided a vehicle, fuel card, maintenance of the truck, pay per mile, and medical and full benefits after six months. Defendants deny that the claimant was an employee.

The claimant was required to use the vehicle provided by defendants, follow all directions, to meet specific pick-up and drop-off times, not to use equipment for any independent jobs, not to hire other drivers to drive his miles. His compensation was based solely on miles driven and time spent waiting for loads or maintenance. He received no percentage of loads delivered. There was no opportunity for profit or loss beyond the set compensation. No written independent contractor agreement was presented to the claimant nor was one signed. His work hours were logged to the minute. (Transcript pages 51-52) Claimant was issued a 1099 but it was issued only after the injury and a request for work records. It was not established if it even predated the injury, or was merely created for this litigation. The claimant was not an independent contractor. He was an employee, not an independent contractor.

On January 1, 2015, claimant went to Waterloo, Iowa to have M & D perform repairs on his truck. One issue was the hinges on the driver side door required the door to be lifted and then slammed hard. The repair was not made. Then at the direction of M & D the claimant left Ames, Iowa with a load to be delivered to Texas with specific instructions as to pick up and delivery time provided by M & D. On a fuel, water, and food stop in Muskogee, Oklahoma the claimant slammed his right pinky finger in the

truck (tractor) door and amputated the tip of the finger. He immediately called M & D to report the injury.

When M & D would provide no direction or help with what to do next, the claimant drove himself to the emergency department of the Muskogee Regional Medical Center. (Ex. 8, pages 5-7; Exhibit 2) At the ER the claimant learned that M & D had no workers' compensation insurance. He then drove to a second location where he paid $450.00 out of pocket for medical service. The following day Jimmy Dang, D.O., performed a revision amputation of the claimant's small right finger. (Ex. 5) After surgery, he was forced to sleep in the cab because M & D would not pay for a hospital bed and claimant could not afford one. On January 3, 2015, M & D texted claimant to finish the delivery of his freight which he did to avoid a career ending "abandonment" on his driving record.

Claimant then returned to his home in Nashville after delivering his load. On January 7, 2015, he went to the Nashville General Hospital due to increased pain and swelling in his hand. (Ex. 6, 7) Follow up care was with Thomas J. Limbird, M.D. (Ex. 8)

In a letter by defense counsel to the claimant's counsel on January 23, 2015 it was stated: "However, the employer is entitled to be kept abreast of medical treatment, and as of now, has the right to select providers." (Ex. 13) That is an admission against interest that the claimant was an employee. Defense counsel also promised that benefits and medical would be paid. It never was. After the claimant was released to work effective March 18, 2015, he was informed that M & D no longer had need for his services.

The claimant still suffers symptoms from this injury. He has a throbbing pain in the flesh and bone. He has been diagnosed with phantom-type pain which affects his ability to sleep. (Ex. 1) Claimant now tries to use his other hand (left) whenever possible, even though he is right handed, to minimize pain. He also explained credibly why he could never return to construction work. The claimant also needs revision work done on his amputation, "sooner rather than later." (Ex. 1, p. 4) A 7 percent of the whole body impairment was opined by H. James Wiesman, M.D. (Ex. 1, p. 3)

Claimant is unable to return to some relevant past employment. There is a loss of industrial capacity. Phantom pain makes the injury one of the body as a whole (BAW) as opposed to scheduled. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 20 percent loss of earnings capacity.

Employers own witnesses testified to M &D's violation of laws and regulations. M & D is no longer in business and has no assets. It was shut down (banned from trucking) by the Federal Safety Motor Carrier Administration (FSMCA) due to numerous issues. Mr. Pajazetovic was the principal and owner of M & D. He at least once paid the claimant from his own pocket. He also made a decision to not provide workers' compensation insurance for his employees. Mr. Pajazetovic performed in the capacity

of claimant's employer and can properly be considered to have been the alter ego of M & D. As the owner, he had a statutory duty to see to it that the corporation had workers' compensation insurance for its employees. See section 87.1. A corporate officer cannot fail to provide workers' compensation insurance and then hide behind a corporate veil to avoid personal responsibility. Mr. Pajazetovic is personally liable for payment to the claimant.

On the date of injury the claimant had gross weekly earnings of $833.88, was single, and entitled to 1 exemption. As such his weekly benefit rate is $507.01. The commencement date for permanent benefits was stipulated as March 18, 2015. Claimant also seeks payment of his medical expenses which were reasonable and necessary for treatment of the work injury. Treatment that employer asserted a right to control. Those expenses are detailed in exhibit 9. As of the date of hearing those expenses totaled $12,919.81 plus medical mileage of $179.09. (Ex. 9, p. 1; Ex. 11) Claimant also seeks payment of the Dr. Wiesman independent medical evaluation (IME).

REASONING AND CONCLUSIONS OF LAW

Whether the claimant was an employee.

The first issue is whether the claimant was an employee. According to the statute, an employee is "a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer . . . ." Iowa Code § 85.61(11). Factual disputes are resolved in favor of finding employment status. See Daggett v. Nebraska-Eastern Exp., Inc., 252 Iowa 341, 107 N.W.2d 102, 105 (Iowa 1961).

In Nelson v. Cities Service Oil Co., 259 Iowa 1209, 146 N.W.2d 261, 265 (Iowa 1966), the Iowa Supreme Court pointed to the following five factors in determining whether an employee/employer relationship existed. The test is as follows:

> (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) the identity of the employer as the authority in charge of the work or for whose benefit it is performed.

Id.

Defendants urge a finding that claimant is an independent contractor.

When the issue is an individual's status as an employee versus an independent contractor, the Nelson court has set forth an eight factor test. Id

> (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his

> business or of his distinct calling; (3) his employment of assistants, with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.

Id. at 264-65.

The Nelson court also suggests looking at the intent of the parties.

More important than intent is "the right to control the physical conduct of the person giving service." Id. While the claimant's position did allow for flexibility in hours and the manner in which the job was performed, defendants laid out a specific list of tasks claimant was to undertake.

Parson v. Procter & Gamble Mfg. Co., 514 N.W. 2d 891 (1994), is one of the seminal cases in Iowa on the issue of who the appropriate employer is in a case involving a placement agency. The court applied the five factor test:

> (1) the right to selection, or to employ at will;
>
> (2) responsibility for the payment of wages by the employer;
>
> (3) the right to discharge or terminate the relationship;
>
> (4) the right to control the work; and
>
> (5) is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed.

Henderson v. Jennie Edmundson Hosp., 178 N.W.2d 429, 431 (Iowa 1970).

It was found that claimant was an employee of M & D and Mr. Pajazetovic based on admissions that claimant was an employee, assertion of right to control claimant's medical care, intent, control of work and tracking of time to the minute, discharge of the claimant, and the other factors found above.

Next issue is extent of permanent disability for the injury.

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 Rule of Appellate Procedure 6.14(6).

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 Elec. 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.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W.2d 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

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

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

The claimant has phantom pain from the amputation that affects his ability to sleep. Therefore the loss is the body as a whole. Nelson v. Schieffer Co Int'l., File No. 5043321 (Arb. October 21, 2015). Also see Dowell v. Wagler, 509 N.W.2d 134 (Iowa App. 1993); Reed v. Tyson Foods, File No. 5033048 (Arb. August 1, 2011); Means v. Second Injury Fund of Iowa, File No. 5033141 (Arb. January 8, 2015).

Based on the finding that the claimant has suffered a 20 percent loss of earning capacity, he has sustained a 20 percent permanent partial industrial disability entitling him to 100 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Temporary benefits.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically 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. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

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.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Claimant was in a period of healing from an injury which caused permanent disability from January 1, 2015 through March 17, 2015. Those benefits are defendants responsibility.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant also seeks payment of his medical expenses which were reasonable and necessary for treatment of the work injury. Treatment that employer asserted a right to control. Those expenses are detailed in exhibit 9. As of the date of hearing those expenses totaled $12,919.81 plus medical mileage of $179.09. (Ex. 9, p. 1; Ex. 11) Those expenses are defendants responsibility.

Independent Medical Evaluation

Iowa Code section 85.39 provides, in relevant part, as follows:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Defendant is responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Claimant desires payment/reimbursement of the IME fee of Dr. Wiesman. However, the undersigned could not find the amount of the IME in the record and is unable to award it.

Corporate Veil.

In Butrick v. Falls Lodging Corporation, File No. 973009 (Arb. January 13, 1994) (citing Smith v. CRST, Inc. and Lincoln Sale and Service, File No. 976632 (Arb. November 15, 1993) the corporate veil was pierced to find president and chief officer to be the alter ego of the corporation and therefore personally liable as claimant's employer. Held it would be inconsistent to permit an individual, in the individual's corporate officer capacity, to fail to provide statutorily required workers' compensation coverage then be able to hide behind the corporate veil and maintain an absence of personal liability as regards payment of appropriate workers' compensation benefits to corporate employees who received work-related injuries. The same was found here. Mr. Elvis Pajozetovic is personally responsible for the payment of the workers' compensation claim made by Terrence Adams.

ORDER

THEREFORE IT IS ORDERED:

That the defendants pay the claimant healing period benefits at the weekly rate of five hundred seven and 01/100 dollars ($507.01) for the period of January 1, 2015 through March 17, 2015.

That the defendants pay claimant one hundred (100) weeks of permanent partial disability at the weekly rate of five hundred seven and 01/100 dollars ($507.01) commencing March 18, 2015.

That the defendants pay/reimburse claimant's medical and medical mileage expenses as detailed above.

Costs are taxed to the defendants pursuant to 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 11th day of May, 2017.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.