

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

YVONNE MANSKER,

Claimant,

vs.

WILLOW GARDENS CARE CENTER,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.

Insurance Carrier,
Defendants.

FILED

SEP - 4 2015

WORKERS' COMPENSATION

File No. 5041208

ARBITRATION

DECISION

Head Note Nos.: 1803, 3001

STATEMENT OF THE CASE

Yvonne Mansker, claimant, filed a petition in arbitration seeking worker's compensation benefits from Willow Gardens Care Center, as her employer, and Liberty Mutual Insurance Company, as the applicable insurance carrier. This case proceeded to an arbitration hearing on July 16, 2015. The case was scheduled for a live arbitration hearing to occur in Cedar Rapids, Iowa. However, the parties agreed to submit this case on a written record and no live testimony or hearing was conducted.

Claimant offered exhibits 1 through 4. Defendants offered exhibits A and B. All exhibits were received into the evidentiary record without objection and the evidentiary record closed upon the undersigned's receipt of the parties' exhibits.

The parties also submitted a hearing report, which contains stipulations. The parties' stipulations are accepted and relied upon in entering this decision. No findings or conclusions will be entered with respect to the parties' stipulations and the parties are bound by those agreements.

Counsel requested the opportunity and filed post-hearing briefs on July 24, 2015, at which time this case was considered fully submitted.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent partial disability benefits, if any.
2. The claimant's gross weekly earnings preceding the June 10, 2012, work injury and the applicable corresponding weekly worker's compensation rate.
3. Whether costs should be assessed against either party.

FINDINGS OF FACT

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

Yvonne Mansker tripped and fell on June 10, 2012, while performing her work duties for Willow Gardens Care Center. As a result of the fall, she suffered a left wrist, hand and thumb injury. (Hearing Report; Ex. 1, p. 9; Ex. 2, p. 3)

All treating physicians have recommended conservative care. None of the treating physicians have offered an opinion regarding whether claimant's left wrist and thumb injury has resulted in any permanent impairment. Instead, the parties each obtained an independent medical evaluation.

Defendants scheduled claimant to be evaluated by Rick Garrels, M.D. on October 6, 2014. Dr. Garrels is a board certified occupational medicine physician as well as a certified independent medical examiner. He has practiced medicine since 1993.

Dr. Garrels recorded claimant's subjective complaints as:

[L]eft middle finger pain along the radial DIP joint that is intermittent. She also has left thumb pain over the first metacarpal that is described as an ache. She also describes some left wrist burning sensation along the radial and ulnar aspect.

(Ex. 2, p. 3)

Dr. Garrels' examination demonstrated normal left wrist range of motion, as well as normal forearm and elbow ranges of motion. He noted essentially normal sensation and strength in the left hand. However, Dr. Garrels noted a positive grind test in the left thumb as well as a positive Tinel's sign in the left wrist. Dr. Garrels' only diagnosis for the left wrist and hand was "Left wrist tenosynovitis." (Ex. 2, p. 6)

When asked if claimant has objective evidence to support an injury and ongoing symptoms in her left wrist, Dr. Garrels responded, "Yes, she describes chronic left thumb and middle finger pain. She has clinical findings suggesting tenosynovitis of the left thumb and middle finger." (Ex. 2, p. 7) He recommended "permanent restrictions for no repetitive or sustained left hand/wrist gripping/grasping/pinching." (Ex. 2, p. 8) However, Dr. Garrels opined that claimant has no permanent impairment when using Figures 16-28 and 16-31 on pages 467 and 469 of the AMA Guides, Fifth Edition. (Ex. 2, p. 8)

Claimant's counsel sought a competing evaluation performed by Mark C. Taylor, M.D. on January 28, 2015. Dr. Taylor and Dr. Garrels possess similar credentials. Dr. Taylor, like Dr. Garrels, is a board certified occupational medicine physician. He is a certified medical review officer and has practiced medicine since 2003. Dr. Taylor has served on the board of directors for the American College of Occupational and Environmental Medicine. (Ex. 1, pp. 21-22)

Dr. Taylor recorded ongoing complaints from Ms. Mansker of pain in the radial and ulnar aspects of her left wrist. He noted previous pain in the left long finger that slowly improved with the passage of time. (Ex. 1, p. 12) Dr. Taylor's examination disclosed tenderness in the radial and ulnar aspects of the left wrist. He also discovered tenderness in the dorsal wrist as well as over the first dorsal compartment and first CMC joint. Dr. Taylor documented a positive Finkelstein's test on the left wrist. (Ex. 1, p. 14)

Dr. Taylor diagnosed claimant with "left trapeziometacarpal synovitis with early arthrosis and left long finger sprain." (Ex. 1, p. 16) Dr. Taylor also noted "ulnar sided wrist pain, which may represent tenosynovitis and/or a TFCC injury. She also has findings consistent with de Quervain's tenosynovitis." (Ex. 1, p. 16)

Ultimately, Dr. Taylor recommended permanent work restrictions, including that "she avoid any repetitive, sustained or forceful gripping, grasping or pinching with the left hand and wrist." (Ex. 1, p. 17) Dr. Taylor opined that claimant sustained a 6.5% permanent impairment of the left thumb. Dr. Taylor also identified a 2% permanent impairment in the left upper extremity as a result of reduced range of motion in claimant's left wrist. (Ex. 1, p. 16) Combining the left thumb and left wrist impairments, Dr. Taylor opined that claimant sustained a 5% permanent impairment of the left upper extremity as a result of the June 10, 2012, left wrist and hand injury. (Ex. 1, p. 17)

When comparing the medical reports from Dr. Garrels and Dr. Taylor in an effort to determine which permanent impairment rating is more convincing, I note that Dr. Taylor has provided very specific range of motion measurements for both the left wrist as well as claimant's left thumb. Dr. Garrels provides only a summary without referencing any specific ranges of motion.

Both physicians mention objective findings in claimant's left thumb. However, only Dr. Taylor provides a diagnosis for the left thumb or an impairment rating for the left

thumb. Both physicians also opine that claimant requires permanent restrictions as a result of the June 10, 2012, work injury to her left wrist, hand and thumb. Given the need for permanent work restrictions, I find that claimant's left thumb and left wrist have not returned to their pre-injury state, or what claimant would consider "normal."

The AMA Guides, Fifth Edition, defines "impairment" as "a loss, loss of use, or derangement of any body part, organ system, or organ function." (AMA Guides, Fifth Edition, p. 2) "Loss, loss of use, or derangement implies a change from a normal or 'preexisting' state." (AMA Guides, Fifth Edition, p. 2) Considering that claimant continues to have symptoms in the left thumb and left wrist, her injury appears to represent a loss of use, or permanent impairment. Considering that both physicians have imposed permanent work restrictions as a result of the June 10, 2012, work injury, I find that claimant has sustained a loss of use of her left thumb and left wrist.

When considering the definition of loss of use and impairment, Dr. Taylor's permanent impairment rating seems most consistent with the ongoing symptoms claimant experiences. Similarly, when considering the definition of loss of use and impairment, Dr. Taylor's permanent impairment rating seems most consistent with the need for permanent work restrictions. Therefore, I find Dr. Taylor's permanent impairment rating to be most convincing in this case. I find that claimant has proven she sustained a 5% permanent impairment of the left arm as a result of the fall occurring at work on June 10, 2012.

The second disputed issue is the applicable weekly workers' compensation rate. The parties stipulate that claimant was married and entitled to three exemptions on the date of injury. (Hearing Report) However, the parties dispute the applicable gross weekly earnings that should be included in the calculation of the weekly rate.

The parties agree that pay periods resulting in pay checks dated January 13, 2012, January 27, 2012, and February 10, 2012, should be included as customary earnings used to calculate claimant's gross weekly earnings. However, the parties dispute the remainder of the wages that should be included.

Defendants contend that the earnings contained in pay checks dated December 30, 2011, February 24, 2012, March 9, 2012, and June 1, 2012 should be included in the calculation of claimant's gross weekly wages. Claimant contends the earnings contained in those paychecks are not customary of claimant's typical earnings and are not representative. Therefore, claimant contends each of those weeks should be excluded and the earnings contained in pay checks dated August 12, 2011, July 29, 2011, July 15, 2011 and July 1, 2011, should be substituted.

Claimant offered exhibit 4, which contains medical records demonstrating work restrictions for claimant. However, there is no evidence within this evidentiary record that claimant actually missed work or that she missed work for personal reasons during the disputed pay periods. Claimant has not carried the burden of proof to demonstrate that the pay periods resulting in pay checks dated February 24, 2012, March 9, 2012,

and June 1, 2012, are not representative of her customary earnings. The earnings during those pay periods are similar to the earnings during other pay periods claimant asserts should be included within the calculation of gross earnings. Therefore, I find that the earnings reflected within pay checks dated February 24, 2012, March 9, 2012, and June 1, 2012, are representative of claimant's customary earnings.

With respect to the December 30, 2011, pay check, claimant earned only \$332.25 during that two-week pay period. This is only about sixty percent of her customary earnings reflected in other pay checks around that same time frame. Although there is not good evidence to demonstrate why this check is significantly lower than the other disputed and stipulated pay checks, I find that the December 30, 2011, pay check and earnings contained therein are facially significantly different than other pay periods and earnings during the period of time immediately preceding the date of injury. I find the earnings contained in the December 30, 2011, pay check are not representative of claimant's customary earnings during the period immediately preceding her June 10, 2012, work injury.

Instead, I find that it would be more appropriate to substitute the earnings for the pay period resulting in a paycheck dated August 12, 2011, to fairly and accurately reflect claimant's customary earnings. Therefore, I find that it is most appropriate to calculate claimant's average gross weekly wage is as follows:

| Pay Check Date | Total Earnings |
|----------------|----------------|
| 6/1/12 | \$515.96 |
| 3/9/12 | \$665.13 |
| 2/24/12 | \$555.00 |
| 2/10/12 | \$671.07 |
| 1/27/12 | \$668.88 |
| 1/13/12 | \$603.81 |
| 8/6/11 | \$667.51 |
| Total Earnings | \$4347.36 |

Having used 14 weeks of wages, I calculate that the claimant's customary gross average weekly wage immediately preceding the June 10, 2012, date of injury was \$310.53.

CONCLUSIONS OF LAW AND REASONING

The initial dispute presented by the parties for resolution is the extent of claimant's entitlement to permanent disability benefits, if any. Having found that claimant sustained a 5 percent loss of function in her left arm as a result of the June 10, 2012, work injury, I conclude that she is entitled to an award of permanent partial disability benefits in some amount. The parties stipulate that an award of permanent partial disability benefits would be made to the left arm. (Hearing Report)

The Iowa legislature has established a 250 week schedule for arm injuries. Iowa Code section 85.34(2)(m). Claimant is entitled to an award of permanent partial disability benefits equivalent to the proportional loss of her left arm. Iowa Code section 85.34(2)(v); Blizek v. Eagle Signal Company, 164 N.W.2d 84, 87 (Iowa 1969). Five percent (5%) of 250 weeks equals 12.5 weeks. Claimant is, therefore, entitled to an award of 12.5 weeks of permanent partial disability benefits against the employer. Iowa Code section 85.34(2)(m), (v).

The second issue presented for resolution is the proper weekly rate at which benefits should be paid to claimant. The parties stipulated that claimant was married and entitled to three exemptions on the date of injury. (Hearing Report) However, the parties could not reach consensus on the claimant's average gross weekly earnings or applicable weekly worker's compensation benefit rate.

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).

In this instance, claimant bears the burden of proof to establish the higher weekly rates she asserts should apply.

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 the employee was 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 is excluded, however. Section 85.36(6).

Having found that there is no evidence in this record to demonstrate that claimant missed work for personal reasons during the disputed weeks resulting in paychecks dated June 1, 2012, March 9, 2012, and February 24, 2012, I conclude those disputed weeks are representative of claimant's customary earnings at the time of the injury and should be included within the calculation of claimant's gross weekly earnings pursuant to Iowa Code section 85.36(6).

Having found that the disputed bi-weekly pay resulting in the December 30, 2011, paycheck are not representative of claimant's customary earnings immediately preceding the June 10, 2012, date of injury, I conclude those earnings should be excluded from calculation of the gross weekly earnings. Instead, I substitute the pay period earnings resulting in the August 12, 2011, paycheck. As noted in the findings of fact, this results in the inclusion of 14 weeks of earnings totaling \$4,347.35 in wages, or gross average weekly wages totaling \$310.53.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant's gross average weekly wage was \$310.53, and using the Iowa Workers' Compensation Manual with effective dates of July 1, 2011, through June 30, 2012, I conclude that the applicable weekly workers' compensation rate is \$230.52.

Claimant also seeks assessment of costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40.

Claimant prevailed on the permanent partial disability claim she asserted, which was the primary disputed issue. Therefore, I exercise the agency discretion and conclude that it is appropriate to assess claimant's costs. Defendants shall reimburse claimant's filing fee of \$100.00. 876 IAC 4.33(7). Defendants will also be ordered to reimburse claimant's service fees totaling \$12.96. 876 IAC 4.33(3).

ORDER

THEREFORE, IT IS ORDERED:

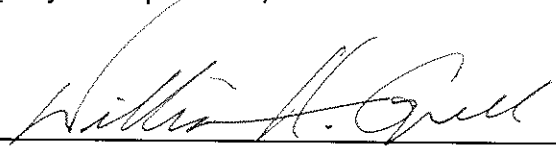
Defendants shall pay claimant twelve point five (12.5) weeks of permanent partial disability benefits commencing on June 10, 2012, at the rate of two hundred thirty and 52/100 dollars (\$230.52) per week.

Defendants shall pay all accrued weekly benefits in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant's costs totaling one hundred twelve and 96/100 dollars (\$112.96).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2), and 876 IAC 11.7.

Signed and filed this 4th day of September, 2015.



WILLIAM H. GRELL
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.