



## FINDINGS OF FACT

In 2018, Hem worked for Wirtjes Concrete as a general laborer on a concrete crew. (Arbitration Decision) Wirtjes Concrete paid Hem \$11.00 per hour and he worked between 30 and 35 hours per week. (Arbitration Decision) At the time of the hearing on the review-reopening action Hem was sixty.

Hem has not graduated from high school. (Hem Testimony) Hem attended college and completed coursework for an associate of arts degree, but the school discovered he had not graduated from high school and withdrew his diploma. (Hem Testimony)

Hem informed Wirtjes Concrete he injured his right long finger on November 16, 2018. (Arbitration Decision) Wirtjes Concrete did not provide Hem with any medical care. (Arbitration Decision) Hem continued to work in concrete and his right long finger became infected and badly swollen. Hem reported his finger hurt and it was full of infection and noted physicians had told him he had experienced concrete burn, a poisoning, which caused the infection. (Arbitration Decision)

Hem received treatment through various medical providers, including the University of Iowa Hospitals and Clinics ("UIHC"), where he was hospitalized. (Arbitration Decision). Following his discharge from the hospital, Hem received ongoing care from Mark Zacharjasz, M.D., a family medicine physician. (Arbitration Decision) Dr. Zacharjasz assessed Hem with a right finger infection, prescribed antibiotics, and recommended a referral to Iowa Hand. (Arbitration Decision)

On January 2, 2019, Paul Riggs, M.D., a surgeon, examined Hem and diagnosed him with extensor tenosynovitis of the right long finger, an earlier "concrete burn" to the dorsal surface of the distal interphalangeal joint in November 2018, and congestive heart failure. (Arbitration Decision) On January 4, 2019, Dr. Riggs performed an exploratory surgery on Hem's finger, and prescribed cephalexin. (Arbitration Decision) Dr. Riggs noted a distal interphalangeal joint complete amputation just proximal to the joint may be very helpful in the long term. (Arbitration Decision) Hem continued to treat with Dr. Riggs. (Arbitration Decision)

Dr. Riggs recommended an amputation of Hem's right long finger. (Arbitration Decision) Hem sought a second opinion from Timothy Fowler, M.D., an orthopedic surgeon at the UHIC. (Arbitration Decision) Dr. Fowler examined Hem, listed an impression of chronic osteomyelitis in the right long finger distal phalanx and middle phalanx, and recommended amputation through the middle phalanx. (Arbitration Decision) Dr. Fowler performed a right long finger amputation through the middle phalanx distal to the flexor digitorum superficialis insertion on Hem. (Arbitration Decision)

On August 15, 2019, Dr. Zacharjasz released Hem to return to work and noted he should avoid cement exposure with his hands unless he wore chemical gloves. (Arbitration Decision)

Hem was off work from November 16, 2018, until Dr. Zacharjasz released him to return to work on August 15, 2019. (Arbitration Decision) Hem reported Wirtjes Concrete never offered him employment after his work injury. (Arbitration Decision) Hem returned to work for a bricklayer in September 2019, for a few weeks. (Arbitration Decision) At the time of the original hearing Hem was not working. (Arbitration Decision)

An arbitration hearing was held on October 21, 2019. An arbitration decision was issued on November 13, 2019, finding Hem sustained a scheduled member disability of ninety percent to his right long finger and awarding Hem 27 weeks of permanent partial disability benefits at the rate of \$238.54 per week, in addition to other relief. (Arbitration Decision)

Dr. Zacharjasz referred Hem to a pain management specialist, Greg Kronenberg, CRNA. (Ex. 1) On October 31, 2019, Hem attended an appointment with Kronenberg, complaining of significant sharp and aching pain, which was worse with cold and contact. (Ex. 1, p. 30) Kronenberg documented Hem had tried gabapentin without relief and oxycodone provided relief. (Ex. 1, p. 30) Kronenberg assessed Hem with right middle finger phantom limb/neuropathic pain and possible right middle finger complex regional pain syndrome, continued Hem's oxycodone, prescribed Lyrica, and recommended a right stellate ganglion block. (Ex. 1, p. 31)

In 1993 or 1994 the Social Security Administration approved Hem to receive Social Security Disability Insurance ("SSDI") benefits after he sustained a closed head injury while driving. (Hem Testimony) Hem receives \$880.00 per month in SSDI benefits. (Hem Testimony) Hem reported at the time of his work injury he was working under a nine-month trial work period. (Hem Testimony) Hem did not complete the trial work period due to his work injury and his SSDI benefits have continued. (Hem Testimony)

On November 27, 2019, Hem returned to Dr. Zacharjasz, reporting he had seen pain management and he was considering a stellate ganglion block to help alleviate phantom limb/neuropathic pain following the amputation of his right long finger. (Ex. 1, p. 22) Dr. Zacharjasz documented Hem's pain was chronic and uncontrolled and he prescribed pregabalin and oxycodone. (Ex. 1, pp. 22-23) Hem testified he has a chronic knee problem and that the nerve block would affect the pain he feels in his knee. (Hem Testimony) Hem reported he decided not to have the nerve block because he did not want the pain to subside in his knee where he would damage his knee. (Hem Testimony)

On January 28, 2020, Hem attended an appointment with Dr. Zacharjasz, to follow up from an emergency room visit after falling on the ice and sustaining rib fractures. (Ex. 1, p. 13) Dr. Zacharjasz also examined Hem's right hand. (Ex. 1, p. 14)

On May 11, 2020, Hem returned to Dr. Zacharjasz complaining of right middle finger neuropathic pain. (Ex. 1, p. 5) Dr. Zacharjasz assessed Hem with neuropathic pain and referred Hem to pain management. (Ex. 1, pp. 2-5)

Hem testified since the prior hearing he has not worked much. (Hem Testimony) A few weeks before the hearing Hem commenced self-employment working for Mary Walsh, the owner of apartment buildings. (Hem Testimony) Hem relayed he performs basic repair work, including installing new doors and trim, and repairing plaster walls. (Hem Testimony) Hem testified he has been working four to six hours per day and earns \$5.00 per hour. (Hem Testimony) Hem reported that at the time of the work injury he was working thirty to forty hours per week. (Hem Testimony)

Hem testified that since the original hearing he has been experiencing phantom pain that interferes with his ability to sleep and work. (Hem Testimony) Hem reported the pain is in the area where his finger was amputated and extends into his right arm through his wrist. (Hem Testimony) Hem reported the cold and vibration aggravate his pain. (Hem Testimony) Hem is right-hand dominant.

Hem reported he can only work four to six hours per day since his phantom pain developed. (Hem Testimony) Hem relayed that before the pain developed he could work over five or six hours per day. (Hem Testimony) Hem testified when his pain increases he starts dropping things. (Hem Testimony) Hem testified when the pain sets in he cannot handle a saw because he is afraid he will drop the saw. (Hem Testimony) Hem testified he has a difficult time holding nails and handling the vibration of a screw gun, which aggravate his pain. (Hem Testimony) Hem reported before he developed phantom pain he could pound nails into two by four boards for one hour to ninety minutes, now he can only tolerate using a hammer for fifteen minutes. (Hem Testimony) Hem also has difficulty managing pocket change, and often drops it on the ground. (Hem Testimony)

Hem testified before he developed phantom pain he took two oxycodone tablets per day, but now he takes a third so he can sleep. (Hem Testimony) Hem reported his normal pain level is a four out of ten and when he is working his pain often raises to a level ten. (Hem Testimony) Hem's pain also increases to this level when he vacuums his home. (Hem Testimony) The pain also increases without any activity, and is worse in the cold. (Hem Testimony) Hem described the feeling of the pain where his finger is gone as like being stuck with a knife. (Hem Testimony)

Hem worked in auto body work, repairing and painting damaged vehicles for thirty years before his work injury. (Hem Testimony) Hem relayed he can no longer paint cars because he is right-hand dominant and he cannot close his hand properly to operate the paint gun. (Hem Testimony)

## **CONCLUSIONS OF LAW**

### **I. Review-Reopening**

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code § 86.14(2). The deputy workers' compensation

commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers' compensation commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers' compensation commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, "subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*" Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (emphasis in original).

In the original arbitration hearing I found Hem sustained a scheduled member disability of ninety percent to his right long finger and awarded Hem twenty-seven weeks of permanent partial disability benefits at the rate of \$238.54 per week, in addition to other relief. Hem alleges the injury to his right long finger has caused phantom pain, which extends into his body as a whole, entitling him to additional workers' compensation benefits. This raises an issue of medical causation.

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Kronenberg assessed Hem with right middle finger phantom limb/neuropathic pain and possible right middle finger complex regional pain syndrome. (Ex. 1, p. 31) Kronenberg did not find Hem had sustained complex regional pain syndrome. Kronenberg assessed Hem with phantom pain/neuropathic pain.

In the case of Dowell v. Wagler, 509 N.W.2d 134, 138 (Iowa Ct. App. 1993), the Iowa Court of Appeals held that phantom pain is an unscheduled disability and compensable as an industrial disability. Based on his testimony and Kronenberg's assessment, I find Hem has established the injury to his right long finger extends to the body as a whole.

“Industrial disability is determined by an evaluation of the employee’s earning capacity.” Pease, 807 N.W.2d at 852. In considering the employee’s earning capacity, the deputy commissioner evaluates several factors, including “consideration of not only the claimant’s functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment.” Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee’s “ability to be gainfully employed.” Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

Hem is sixty. While he did not graduate from high school, he did successfully complete classes for an associate of arts degree. Hem attended college and completed coursework for an associate of arts degree, but the school discovered he had not graduated from high school and withdrew his diploma. Hem is somewhat motivated to work and started working shortly before the hearing after being off work for an extended period of time. He has received SSDI for over twenty-five years. Hem worked thirty to forty hours per week before his work injury and earned \$11.00 per hour, which is six to eight hours per day. He now works four to six hours per day and reported he earns \$5.00 per hour. Hem is self-employed and he has not looked for other work. Hem does not have any permanent restrictions at this time. I find, considering the factors of industrial disability, Hem has sustained an additional impairment of thirty percent due to phantom pain, entitling him to an additional 150 weeks of permanent partial disability benefits at the previously determined rate of \$238.54 per week.

## II. Medical Bills

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers’ compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. “The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee.” Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner “may, upon application and reasonable proofs of the necessity therefor, allow and order other care.” Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting “[t]he employer’s obligation under the statute turns on the question of reasonable necessity, not desirability”). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

Hem submitted medical bills in Exhibit 2. Exhibit 2 contains bills for treatment Hem received before the original arbitration hearing. As discussed at hearing, this case concerns what has occurred since the original action. Hem is not entitled to recover medical bills incurred before October 21, 2019. He provided medical records for treatment received on October 25, 2019, October 31, 2019, November 27, 2019, and January 28, 2020. I find the defendant is responsible for these bills. Hem did not provide any medical records for treatment he received on November 4, 2019, December 5, 2019, January 20, 2020, February 8, 2020, June 10, 2020, June 24, 2020, July 24, 2020, or August 2020. I do not find he is entitled to recover bills for this treatment because he did not provide the corresponding medical records to verify the treatment was for his work injury. Some of the bills are for treatment clearly unrelated, for example, a bill from June 10, 2020, which involved an x-ray of his sacrum and coccyx. (Ex. 2, p. 12)

### **III. Costs**

Hem seeks to recover the \$100.00 filing fee. Iowa Code section 86.40, provides, “[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.” Rule 876 IAC 4.33(6), provides,

[c]osts taxed by the workers’ compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors’ and practitioners’ deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors’ or practitioners’ reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The rule expressly allows for the recovery of the filing fee. I find Hem is entitled to recover the \$100.00 filing fee.

### **ORDER**

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay the claimant one hundred and fifty (150) weeks of permanent partial disability benefits at the weekly rate of two hundred thirty-eight and 54/100 dollars (\$238.54) per week, commencing on April 14, 2020.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendant is responsible for all causally related medical bills set forth in Exhibit 2 consistent with this decision.

Defendant shall reimburse the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee.

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

Signed and filed this 21<sup>st</sup> day of January, 2021.

  
HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

H. Edwin Detlie (via WCES)

Wirtjes Concrete (via regular and certified mail)  
PO Box 128  
Lovilia, IA 50150

**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.