

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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BRIAN BARRY,

**FILED**

Claimant,

DEC 13 2017

File No. 5055977

vs.

WORKERS COMPENSATION

ARBITRATION

JOHN DEERE DUBUQUE WORKS  
OF DEERE & COMPANY,

DECISION

Employer,  
Self-Insured,  
Defendant.

: Head Note Nos.: 1803, 2507, 3000, 3002

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STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Brian Barry, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on April 29, 2016. Claimant alleged he sustained a work-related injury on October 17, 2013. (Original notice and petition.)

For purposes of workers' compensation, John Deere Dubuque Works is self-insured. Defendant filed its answer on May 5, 2016. The company admitted the occurrence of the work injury. A First Report of Injury was filed on April 28, 2014.

The hearing administrator scheduled the case for hearing on February 14, 2017. The hearing took place in Waterloo, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Vicki L. Newgard, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Mr. Joshua John Hogan testified via cell phone on behalf of claimant. Defendant elected not to call any witnesses to testify at the hearing. Claimant offered exhibits marked 1 through 15. Defendant objected to exhibit 15, pages 3 through 5. The objection was overruled. Defendant offered exhibits marked A through D. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on March 24, 2017. The case was deemed fully submitted on that date.

Subsequent to the hearing of the case, Commissioner Cortese issued a declaratory order in the PETITION BY JOHN DEERE DES MOINES WORKS, JOHN DEERE DAVENPORT WORKS, JOHN DEERE DUBUQUE WORKS, JOHN DEERE OTTUMWA WORKS, JOHN DEERE WATERLOO WORKS, AND JOHN DEERE FOUNDRY. The Declaratory Order was regarding Profit Sharing Bonus and

Continuous Improvement Pay Plan for determining rate calculations in workers' compensation proceedings for employees who experience workplace injuries. The order was issued on July 12, 2017.

As a result of the declaratory order, the parties were given an additional ten (10) days to recalculate the average weekly wage and the workers' compensation rate.

#### STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on October 17, 2013 which arose out of and in the course of his employment;
3. The injury is a cause of both temporary and permanent disability;
4. Temporary benefits are no longer an issue;
5. Claimant sustained an injury pursuant to Iowa Code section 85.34(2)(s);
6. Defendant has waived any affirmative defenses it may have had available;
7. Prior to the date of the hearing, defendants paid claimant 20 weeks of permanent partial disability benefits at the rate of \$560.47 per week; and
8. The parties agree certain costs that are detailed were paid by claimant.

#### ISSUES

The issues presented:

1. What is claimant's permanent partial disability?
2. What is the proper weekly benefit rate to pay claimant?
3. Is claimant entitled to alternate medical care pursuant to Iowa Code section 85.27?
4. To what credit is defendant entitled?

#### FINDINGS OF FACT

This deputy, after listening to the testimony of claimant at hearing, as well as listening to the testimony of Joshua John Hogan, and after judging the credibility of each

witness, plus after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 58 years old and married. He is right-hand dominant. Claimant resides in Dubuque, Iowa. He started at Deere as a resource worker/temporary worker on January 11, 2011. On April 11, 2011, claimant obtained permanent employee status.

Deere supplied all of the necessary medical care to treat claimant for a bilateral carpal tunnel injury. On March 26, 2014, David S. Field, M.D., a board certified surgeon in orthopedic surgery performed a right open carpal tunnel decompression on the right hand and forearm. (Exhibit A, page 2) Claimant had no intraoperative difficulties and was transported to the recovery room in good condition. (Ex. A, p. 2) Several weeks later, claimant engaged in follow-up care with Dr. Field. (Ex. A, p. 3) Claimant was doing well and the area around his surgical incision was healed too. Claimant did complain of slight palmar soreness, (thenar soreness) on the right hand. (Ex. A, p. 3)

Claimant began complaining of carpal tunnel syndrome on the left side. (Ex. A, p. 3) On May 16, 2014, Dr. Field performed a left open carpal tunnel decompression. (Ex. A, p. 4) Claimant tolerated the surgical procedure without complications and was transported to the recovery room in good condition. (Ex. A, p. 4)

On May 22, 2014, claimant presented to Dr. Field for follow-up care. Claimant had returned to work using his right hand only. He had some stiffness but his numbness had subsided. Claimant's grip strength was improving. (Ex. A, p. 5)

On May 27, 2014, Dr. Field removed the sutures from claimant's left hand. (Ex. A, p. 5) Claimant was told to wear a brace on his left hand while he was at work. (Ex. A, p. 5) Dr. Field released claimant to full duty work with respect to the right carpal tunnel release. (Ex. A, p. 5) Dr. Field released claimant to return to work without restriction on August 12, 2014. (Ex. A, p. 7)

On August 22, 2014, Dr. Field rated claimant as having a permanent impairment. (Ex. A, p. 8) The orthopedic surgeon wrote in his report of the same date:

In lieu of his evaluation and findings at this time, he has done very nicely with both hands. He has no voice complaints. No numbness or paresthesias in either hand. He has appropriate incisional tenderness in the pillar areas.

Our recommendation for impairment rating would be that of approximately 3% impairment of each upper extremity due to the nature of his carpal tunnel syndrome, surgical treatment, and findings at surgery.

This is based on the "Guides to the Evaluation of Permanent Impairment", 5<sup>th</sup> Edition, as published by the American Medical Association, **Page 495**.

If indeed a bilateral impairment rating is necessary, he would merit approximately a total of 4% whole person impairment using these Guides, Table 16-3. I would be pleased to provide any further information you so desire. I hope this letter is satisfactory at this time.

(Ex. A, p. 8)

On April 21, 2015, claimant returned to Dr. Field. Claimant experienced pain and stiffness in the right hand. (Ex. A, p. 9) He also complained of pain in his wrists and forearms for several weeks. (Ex. A, p. 9) Dr. Field discovered claimant had some mild triggering of the ring and long fingers of each hand. (Ex. A, p. 9) Dr. Field also diagnosed claimant with thenar muscle wasting on the right hand and some tenderness over the flexor carpi radialis interposition graft distally in both wrists and some mild tenderness over the outcropping tendons of the wrists. (Ex. A, p. 9)

Dr. Field recommended:

PLAN: It appears to me that he has simply a degree of overuse tendinitis and stiffness of his hands with inflammation. He doesn't have a pattern of carpal tunnel. He certainly should be wearing carpal tunnel gloves and he should be on an anti-inflammatory. Celebrex could be a trial if that is available. Reducing the amount of torqueing he is doing with his hands for a period of time could try to get him through this phase. All these factors were reviewed with him today and I will also discuss this with John Deere. It may simply be overuse of his hands, which can happen I'm sure in this job.

(Ex. A, p. 9)

Claimant exercised his right to an independent medical examination pursuant to Iowa Code section 85.39. On August 11, 2015, claimant presented to Robin L. Sassman, M.D., MPH, for the examination. Dr. Sassman issued her report on November 18, 2015. The evaluating physician diagnosed claimant with:

1. Bilateral carpal tunnel syndrome; and
2. Bilateral forearm tendonitis, improved.

(Ex. 8, p. 1)

Dr. Sassman noted:

Thenar wasting was noted in the right hand. Spurlings's [*sic*] was negative. Impingement signs were negative. Reflexes were 2+/4 in the

bilateral upper extremities. Durkan's negative. He had normal sensation in the bilateral upper extremities.

An NC-Stat test was completed on bilateral median nerves. The test was normal on the left, but showed right median neuropathy.

(Ex. 8, p. 7)

Dr. Sassman proposed recommendations for additional medical care. (Ex. 8, p. 8) She proposed:

Given his continued symptoms in the bilateral hands, Mr. Barry may benefit from a repeat EMG/nerve conduction study of the bilateral upper extremities to more accurately determine the level of residual compression that exists for the median nerve and if compression of the ulnar nerve is an issue as well. On the previous EMG the ulnar nerve was normal; however, he continues to have a loss of sensation in the distribution of the ulnar nerve in both hands; therefore, it is reasonable that he be re-evaluated for this.

(Ex. 8, p. 8)

Dr. Sassman did rate claimant as having a permanent impairment rating. She relied on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Her ratings were calculated as follows:

With respect to the right carpal tunnel syndrome, and based on the instructions on page 495, Mr. Barry falls into the first category because he had positive clinical findings of median nerve dysfunction and electrical conduction delay. Therefore, from Table 16-15, he has a sensory deficit, so the 39% value was used. Turning to Table 16-10 on page 482, I would place him in a Category 4 using a 25% modifier. When the 39% value is multiplied by the 25% value, 9.75% left upper extremity is derived. I am instructed in *The Guides* to round this number up to 10% upper extremity impairment.

With respect to the left carpal tunnel syndrome, and based on the instructions on page 495, Mr. Barry falls into the first category for this as well due to positive clinical findings of median nerve dysfunction although there was no electrical conduction delay. Therefore, from Table 16-15, he has a sensory deficit, so the 39% value was used. Turning to Table 16-10 on page 482, I would place him in a Category 4 using a 25% modifier. When the 39% value is multiplied by the 25% value, 9.75% left upper extremity is derived. I am instructed in *The Guides* to round this number up to 10% upper extremity impairment.

Using the Combined Values Chart on page 604, 10% upper extremity impairment (for the right CTS) is combined with 10% upper extremity impairment (for the left CTS) for a total of 19% upper extremity impairment. Using Table 16-3 on page 439 this is converted to 11% whole person impairment. At first glance, this number appears high; however, given that he still has significant residual symptoms even after surgery, and it has impacted both of his upper extremities, this appears reasonable.

(Ex. 8, pp. 8-9)

Dr. Sassman acknowledged claimant seemed to be performing well in the position he held at Deere. However, if claimant did change positions, Dr. Sassman restricted claimant from repetitively and forcefully gripping and grasping on more than an occasional basis. The doctor also advised claimant to limit the use of vibratory and power tools. Claimant was advised to use those tools sparingly. (Ex. 8, p. 9)

Claimant described the type of movements that caused him the most difficulties. He testified:

Q. (By Mr. McAndrew) What common movements of your elbows, forearms, wrists, hands, fingers cause you the most difficulty? And if you want to describe it to certain parts of the day you have difficulty, please do.

A. I would say gripping - - gripping and grasping, I don't really understand the difference in that. I know there's two different words.

Q. But tell us the problems.

A. So what happens is, as I grip my hands right now, if I squeeze a fist, my forearms up to my wrists I will get a cracking. I hear - -

Q. What's cracking when you say - -

A. I believe it's my tendons. So by pushing and pulling, using my hands forcefully, will irritate my symptoms that I - -

Q. Where?

A. Throughout my hand and forearm.

Q. So gripping, grasping, pushing, pulling.

A. Yes.

Q. How much can you do of these things before you feel it's best just to pull away from this task?

A. I would do it until it starts hurting. You know. And it depends on the day. It depends on what the part of the day is. As the day wears on, it becomes harder. In the morning I feel good. You know, I'm refreshed from my rest from the night before. But as I work during the day, you know, the fatigue sets in faster. But I mean - - and then I feel limber at work because I'm constantly moving and that, but as I'm driving home, I mean, I can just feel my hand and forearms stiffen up.

Q. How is your grip compared to before the injury?

A. Much less. I would give a perfect example. I was the guy they used to bring the pickle jar to to [sic] open up when it was brand new, and now I would say, "Go find somebody else."

Q. You said something about a football?

A. Oh, yeah, I can - - I never realized it until we had a family gathering last fall and I was always the quarterback because I have a great pass, and I cannot grip/grasp a football because I didn't have - - I believe it's because of my little finger.

Q. What do you mean?

A. Well, because of this - - since I've had the surgeries, I cannot touch my pinky.

Q. You can't bring your thumb across and touch your small finger.

A. No, I can't. And it's noted in all of my - -

Q. Sure. You said something about having difficulty in the morning with your hands.

A. Sure. At night I - - to sleep restfully, I wear - - I still wear my surgical braces that I received from Dr. Field's nurses when they put them on. The same ones I came home from the hospital with.

Q. You wear them on both hands every night?

A. Every night.

Q. Why?

A. Because it helps me sleep.

Q. Why?

A. Because it keeps me from curling my wrist up. It keeps me in a position that keeps my - - it feels like it keep everything flowing. It keeps it in a cocked - -

Q. What happens if you don't wear the braces?

A. I would - - well, I always do, but if I didn't, I'm sure I would wake up. I would not sleep.

Q. What wakes you up when you don't wear the braces?

A. Just it would become uncomfortable.

Q. You're losing me. I'm afraid you're losing the judge. What do you mean?

DEPUTY COMMISSIONER: No, he's not losing me. I'm following. I know what he means.

A. Yeah. I mean, it becomes something I would notice. It would make me notice.

(Transcript, pp. 61-65)

Under the Iowa Workers' Compensation Act permanent partial disability is categorized as either to a scheduled member or to the body as a whole. See section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and compensation payable for those injuries. The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). Compensation for scheduled injuries is not related to earning capacity. The fact-finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

The parties stipulated claimant sustained a permanent disability. A wrist injury is an injury to the arm, not to the hand. Holstein Elec. v. Breyfogle, 756 N.W.2d 812, 813 (Iowa 2008).

The parties agree claimant sustained bilateral injuries to both arms and therefore his injury is calculated pursuant to Iowa Code section 85.34(2)(s). The subsection provides:

s. The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five



hundred weeks and shall be compensated as such; however, if said employee is permanently and totally disabled the employee may be entitled to benefits under subsection 3.

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

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

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

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

The undersigned accepts the ratings provided by Dr. Sassman coupled with the testimony of claimant to be the most accurate picture of claimant's permanent impairment. Dr. Sassman provided a detailed report. She described how she arrived at her permanent impairment of 11 percent to the body as a whole. Claimant buttressed the report with his testimony about the residual problems he had at the time of his arbitration hearing. The undersigned found claimant to be a credible witness. He did not appear to be exaggerating his symptoms. He provided very specific examples of problems he encountered as a result of his bilateral carpal tunnel syndrome. It is the determination of the undersigned; claimant has a permanent partial disability of 11 percent to the body as a whole. As a result, claimant is entitled to fifty-five (55) weeks of permanent partial disability benefits effective August 22, 2014 when claimant was returned to work without any restrictions. (Ex. A, p. 8)

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The next issue for resolution is the matter of the weekly benefit rate based upon the declaratory order issued by Commissioner Joseph S. Cortese, II on July 12, 2017. The record was re-opened and the parties were asked to re-calculate the weekly benefit rate in light of the declaratory order. The weekly benefit rate was duly calculated according to the declaratory order. The corrected rate is \$552.46. All benefits shall be paid at the rate of \$552.46 and defendant shall take credit for all permanency benefits previously paid at an incorrect rate.

The final issue is the issue of alternate medical care. Claimant is requesting EMG/NCV testing per the recommendation of Dr. Sassman. The basis for the recommendation is: claimant continues to have a loss of sensation in the distribution of the ulnar nerve in both hands. Dr. Sassman opined such a test is reasonable given the symptoms claimant had been experiencing for approximately one year. This deputy is in agreement with Dr. Sassman. Such a diagnostic test appears reasonable. Defendant has the right to select the physician to perform the testing. However, the tests should be ordered within twenty-one (21) days of the filing of this decision.

The final issue is costs to litigate. Iowa Code section 86.40 states:

**Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

**Costs.** Costs 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. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports

may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

The following costs are assessed to defendant:

Filing fee     \$100.00

Service fee    unknown

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant a total of fifty-five (55) weeks of permanent partial disability benefits at the weekly benefit rate of five hundred fifty-two and 46/100 dollars (\$552.46) commencing from August 22, 2014.

Defendant shall take credit for all permanency benefits previously paid to claimant.

Accrued benefits shall be paid in a lump sum, together with interest, as provided by law.

Within twenty-one (21) days of the filing of this decision, defendant shall schedule EMG/NCS testing for claimant with a provider of defendant's choosing.

Costs are assessed to defendant as detailed in the body of this decision.

Defendant shall file all reports as required by law.

Signed and filed this 13<sup>th</sup> day of December, 2017.



MICHELLE A. MCGOVERN  
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.