

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PHILLIP AHRENS,

Claimant,

vs.

EARWOOD FAMILY PROPERTIES, LLC,

Uninsured Employer,

Defendant.

File No. 5066611

A P P E A L

D E C I S I O N

Head Notes: 1100; 1402.10; 1403.30; 1801;
1803; 2001; 2501; 2907

Defendant Earwood Family Properties, LLC, uninsured employer, appeals from an arbitration decision filed on February 25, 2021, and from a ruling on motion for rehearing filed on March 17, 2021. Claimant Phillip Ahrens responds to the appeal. The case was heard on September 8, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 29, 2020.

In the arbitration decision, the deputy commissioner found claimant was defendant's employee when the stipulated injury occurred on October 31, 2018. The deputy commissioner therefore found claimant is entitled to receive workers' compensation benefits from defendant. More specifically, the deputy commissioner found claimant is entitled to receive temporary benefits from October 31, 2018, through December 6, 2018, and 19 weeks of permanent partial disability (PPD) benefits for a 10 percent impairment of the hand.

The deputy commissioner also addressed claimant's motion to amend his petition to include a penalty claim. The deputy commissioner granted claimant's motion to amend, but ordered the penalty claim to be heard on a later date.

In the ruling on motion for rehearing, the deputy commissioner corrected the rate in the Order section of the arbitration decision. The deputy commissioner also ordered defendants to pay for all causally related medical expenses and claimant's costs of the arbitration proceeding.

On appeal, defendant asserts the deputy commissioner erred in finding claimant was an employee at the time of his injury and not an independent contractor. In the alternative, defendant argues the deputy commissioner erred in awarding claimant temporary and PPD benefits and in allowing the amendment of claimant's petition to include a penalty claim.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration decision filed on February 25, 2021, and ruling on motion for rehearing filed on March 17, 2021, are affirmed in part, with some additional analysis, and modified in part.

I affirm the deputy commissioner's finding that claimant was defendant's employee and not an independent contractor at the time of the work injury. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue in their entirety.

Turning to claimant's entitlement to temporary benefits, I affirm the deputy commissioner's finding that claimant is entitled to receive temporary benefits from October 31, 2018, through December 6, 2018, with the following additional analysis:

Defendant asserts on appeal that claimant failed to provide any evidence that he was unable to work following the October 31, 2018, incident. Proof of a complete inability to work is not what the statute requires, however. Iowa Code chapter 85 provides that temporary benefits are to be paid until the employee "is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury." Iowa Code §§ 85.33(1), 85.34(1). In other words, claimant must prove only that he was unable to return to employment substantially similar to the work he performed for defendant.

In this case, claimant was finishing a deck at the time of his injury. Immediately after the injury, claimant underwent surgery performed by Peter Rink, D.O. (Joint Exhibit 1, p. 11) Claimant was discharged from that surgery in an "ulnar gutter splint" that incorporated his middle, ring and little fingers, and he was also given a sling. (JE 1, p. 12) Claimant testified at hearing that it would have been unrealistic for him to perform his construction work while in the sling. (Hearing Transcript, p. 83) He remained in the splint until his amputation surgery on November 15, 2021. (See JE 2, p. 34 (noting claimant's use of the splint on November 9, 2018))

Though claimant did not have any formal doctor-imposed restrictions from October 31, 2018, through November 15, 2021, I find claimant could not have performed jobs similar to deck building or other construction work while he was in a splint and/or a sling and recovering from his first surgery.

After his amputation surgery on November 15, 2021, claimant's surgeon, Tobias Mann, M.D., instructed claimant to keep his splint on and "refrain from any heavy use of his left upper extremity." (JE 1, p. 10) It appears from the medical records that this restriction remained in place until December 6, 2018, at which time Dr. Mann indicated claimant could "continue all his regular activities as tolerated." (JE 2, p. 35) Based both on Dr. Mann's restriction and the use of a splint, I find claimant was incapable of

performing work similar to deck building or other construction work from the date of the injury through December 6, 2018.

Thus, with this additional analysis, I affirm the deputy commissioner's finding that claimant was not capable of returning to substantially similar employment from the date of his injury until his release from Dr. Mann's care on December 6, 2018. I therefore affirm the deputy commissioner's award of temporary benefits from October 31, 2018, through December 6, 2018.

With respect to claimant's entitlement to PPD benefits, I affirm the deputy commissioner's finding that claimant sustained permanent disability as a result of the work injury, but the deputy commissioner's PPD award is modified as follows:

The deputy commissioner in this case found claimant sustained permanent disability as a result of his injury despite the fact that no physician opined as to the extent of claimant's loss or percentage of permanent impairment. Defendant argues on appeal that the deputy commissioner's finding of permanent disability without a physician's impairment rating runs afoul of the language in Iowa Code section 85.34(2)(x). That section provides:

In all cases of permanent partial disability described in paragraphs "a" through "t", or paragraph "u" 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 "t", or paragraph "u" when determining functional disability and not loss of earning capacity.

In the arbitration decision, the deputy commissioner stated: "[T]here 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." (Arbitration Decision, p. 13) At least as it pertains to the facts of this case, I agree.

The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (hereinafter "Guides"), provides the following instructions to assign impairment ratings for digit amputations: "Determine the length of the digit remaining after amputation and evaluate the digit impairment according to . . . Figure 16-5 for the fingers. Amputations through the metacarpal are considered to be 100% impairment of the finger." (Guides, p. 443) Figure 16-5 shows impairment percentages for finger amputations at various levels from the tip of the finger to the MP joint, which is the joint that connects the finger to the hand. (Id.; see id. at p. 443 (noting amputation at MP joint equates to 100 percent impairment of the finger, amputation at PIP joint equates to 80 percent impairment, and amputation at DIP joint equates to 45 percent impairment))

In this case, the records indicate claimant's amputation occurred at or near the PIP joint. The operative report states, "The remnant of the PIP joint was identified and disarticulation was performed. The remainder of the middle phalanx was sharply removed." (JE 1, p. 10) Thus, per the Guides, claimant's amputation at or about the PIP joint equates to an 80 percent impairment of the finger.

The parties in this case stipulated claimant's injury is to the little finger under Iowa Code section 85.34(2)(e). This section indicates compensation is to be paid for 20 weeks for a total loss of the little finger. Because I found claimant sustained 80 percent impairment of his little finger, claimant is entitled to 16 weeks of PPD benefits. The deputy commissioner's award of PPD benefits is therefore modified.

Importantly, the impairment rating in this case is not dependent on measurements of strength or sensory deficits, clinical findings or observations, or interpretation of imaging studies. The rating in this case is likewise not dependent on claimant's subjective complaints. Instead, the rating in this case is based on the objective and undisputed fact that claimant's little finger was amputated. And per the Guides, an impairment rating is compulsory for an amputation at any level, with the level determining the percentage. (See Guides, pp. 442-43)

There is no "agency expertise" required to ascertain the impairment rating in this case. A portion of claimant's little finger is gone. To state the obvious, claimant's amputation is irreversible and simply is what it is. Thus, determining claimant's impairment rating requires nothing more than identifying the level of the amputation and then finding the corresponding percentage in both the text and tables of the Guides.

I agree with the deputy commissioner that the plain language of Iowa Code section 85.34(2)(x) states nothing about requiring a physician's opinion to set impairment. The statute requires only that the impairment is to be determined by using the Guides without reliance on lay testimony or agency expertise. That said, claimants are cautioned against proceeding to hearing without a physician-assigned impairment rating. The overwhelming majority of injuries are given impairment ratings using formulas and tables in the Guides that are nuanced and complicated and require reliance on subjective complaints, in-office measurements, or other factors that are only appropriately considered by a physician. Thus, while in this case claimant's extent of loss and percentage of permanent impairment was determined without a physician's opinion or impairment rating, the holding in this case is based on very specific circumstances and is therefore intended to be very narrow.

With the above-stated additional analysis I therefore affirm the deputy commissioner's determination that claimant is entitled to PPD benefits, but I modify the award to reflect an entitlement of 16 weeks.

Lastly, regarding the penalty issue, I affirm the deputy commissioner's decision to grant claimant's motion to amend to add his penalty claim. I reiterate the deputy commissioner's statement that while a claimant may only bifurcate a penalty claim

before the case is set for hearing, rule 876 IAC 4.2 grants deputy commissioners freedom to do so at any point.

I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, of the deputy commissioner who presided at the arbitration hearing. I find the deputy commissioner correctly assessed witness credibility in this matter. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's credibility determinations.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on February 25, 2021, and the ruling on motion for rehearing filed on March 17, 2021 are affirmed in part, with the above-stated additional analysis, and modified in part.

Defendant shall pay claimant sixteen (16) weeks of permanent partial disability benefits at the weekly benefit rate of three hundred sixty-eight and 35/100 dollars (\$368.35) from December 7, 2018.

Defendant shall pay claimant temporary benefits from October 31, 2018, through December 6, 2018 at the weekly benefit rate of three hundred sixty-eight and 35/100 dollars (\$368.35).

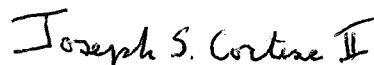
Defendant shall pay medical expenses as set forth in the ruling on motion for rehearing.

Defendant shall pay any 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.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding as set forth in the ruling on motion for rehearing, and defendant shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 31st day of August, 2021.



JOSEPH S. CORTESE II
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)