

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAL NICHOLS,

Claimant,

vs.

BEAUTIFUL LAWNS BY LONG'S LLC,

Employer,

and

UNINSURED,

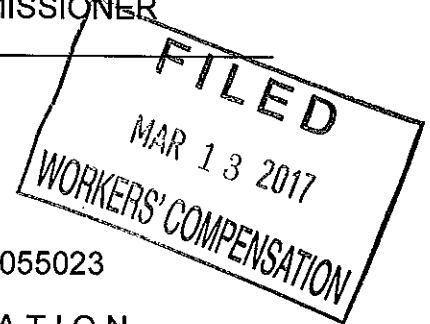
Insurance Carrier,
Defendant.

File No. 5055023

ARBITRATION

DECISION

Head Note Nos.: 1802; 1803; 2501; 2701



STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Michal Nichols, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on September 23, 2015. Claimant alleged he sustained a work-related injury on July 8, 2014. (Original notice and petition.) Claimant filed a proof of service on November 10, 2015. Certified mail with domestic return receipt cards were sent to the following addresses:

Beautiful Lawns by Long's, LLC
217 East Diehl Avenue
Des Moines, IA 50313

Date of Delivery 9-26-15

Beautiful Lawns by Long's, LLC
c/o Registered Agent, Jason Springer
3111 Douglas Avenue
Des Moines, IA 50310

Date of Delivery 10-1-15

No one appeared or answered on behalf of defendant. On March 24, 2016 a Notice of Intent to File Written Application for Default was filed by claimant. Copies of the notice were sent to both the employer and the registered agent. On May 23, 2016, an Application for Entry of Default was filed by claimant. The undersigned filed an entry of default and order setting in-person hearing on June 8, 2016. The original hearing was scheduled for July 21, 2016 at 10:00 a.m. The hearing was continued per a request from claimant's counsel.

The hearing administrator scheduled the case for a telephone hearing on January 30, 2017.

Claimant testified on his own behalf. Claimant offered exhibits marked 1 through 5. Defendants did not appear. All proffered exhibits were admitted as evidence in the case.

The case was deemed fully submitted on January 30, 2017.

STIPULATIONS

Counsel for claimant 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 July 8, 2014 which arose out of and in the course of her employment;
3. The alleged injury is a cause of both temporary and permanent disability;
4. Claimant is entitled to healing period benefits from July 8, 2014 through September 18, 2014;
5. If permanency is found, the permanency is a scheduled member injury;
6. A permanent work injury is determined, and claimant reached maximum medical improvement on September 19, 2014;
7. The weekly benefit rate is \$382.18 per week;
8. Claimant is entitled to the payment of certain medical expenses;
9. Prior to the date of the hearing, defendant paid claimant 3 weeks of wages at \$350.00 per week and defendant is entitled to a credit for the same; and
10. Defendant shall pay certain costs as detailed by claimant.

ISSUES

The issues presented are:

1. To what extent is claimant's permanent partial disability?
2. For what medical costs is defendant liable?

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant at hearing, after judging his credibility, and after reading the evidence, 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 48 years old. He is single. He sustained an injury to his left thumb/hand on July 8, 2014 as he was changing a tire on a grass mower. A machine fell on his hand and smashed his thumb.

Michael A. Gainer, M.D., an orthopedic surgeon at Iowa Ortho, examined claimant on the day of the work injury. (Exhibit 1, page 1) Dr. Gainer diagnosed claimant with "Left Thumb Pain." (Ex. 1, p. 3) Claimant was treated with pain medication.

X-rays were taken. The results revealed: "Closed fracture of distal phalanx or phalanges of hand (816.02)" (Ex. 1, p. 4) Dr. Gainer recommended pinning. (Ex. 1, p. 4) Claimant was provided with temporary restrictions for the left thumb. (Ex. 1, p. 5)

On July 16, 2014, Dr. Gainer performed a closed reduction percutaneous pinning left thumb distal phalanx fracture. (Ex. 2, p. 1) Claimant tolerated the procedure well and was taken to the recovery room in satisfactory condition. (Ex. 2, p. 1)

Claimant returned to Dr. Gainer for follow up care on August 14, 2014. (Ex. 1, p. 6) Claimant reported the following to the surgeon:

The symptoms are reported as being mild. The symptoms occur randomly. The location is left thumb. Aggravating factors include certain movements. Relieving factors include pain meds. [P]atient states he has numbness on tip of thumb no tingling or swelling.

(Ex. 1, p. 6)

X-rays revealed the fracture and the pins were in good position. (Ex. 1, p. 7) Claimant remained on temporary restrictions for his left thumb. (Ex. 1, p. 8) Those same restrictions were maintained on August 28, 2014. (Ex. 1, p. 11)

Claimant sought an independent medical examination and evaluation. He presented to Sunil Bansal, M.D., M.P.H., a well-known physician in the workers' compensation arena. Dr. Bansal examined claimant on January 9, 2017. (Ex. 3, p. 1) At the time of the examination, claimant reported the problems he was experiencing with his left thumb. He stated:

He continues to have extreme hypersensitivity to cold, as well as difficulty with flexion of the interphalangeal joint. He also has some difficulty with flexion of the metacarpophalangeal joint. He is able to fully extend his thumb, and has no numbness or tingling.

(Ex. 3, p. 2)

When Dr. Bansal examined claimant's left thumb, the physician found:

LEFT THUMB:

There is tenderness over the MP and IP joints of the thumb. Loss of two point sensory discrimination over the volar pad.

RANGE OF MOTION:

Thumb IP 8-28 degrees.

MP 0-31 degrees.

Full abduction and opposition.

GRIP STRENGTH:

Mr. Nichols is right-handed.

Grip strength measurements with the dynamometer.

Right: 40 kg.

Left: 34 kg.

(Ex. 3, p. 2-3)

Dr. Bansal diagnosed claimant with a left thumb fracture. (Ex. 3, p. 3) The doctor noted the following about claimant's condition:

He continues to have extreme hyper sensitivity to cold, as well as difficulty with flexion of the interphalangeal joint. He also has some difficulty with flexion of the metacarpophalangeal joint. He is able to fully extend his thumb, and has no numbness or tingling.

(Ex. 3, p. 3)

Dr. Bansal opined claimant had a permanent impairment. He rated claimant in the following fashion:

With reference to the **AMA Guides of Evaluation for Permanent Impairment, Fifth Edition, (Guides)**, specifically Figures 16-12, 16-15

RANGE OF MOTION % thumb impairment

Thumb MP (0 to 31 degrees) 3

Thumb IP (8 to 28 degrees) 4

Total thumb impairment = 7% = 3% hand= 3% upper extremity impairment.

(Ex. 3, p. 4) Dr. Bansal did not recommend additional treatment. (Ex. 3, p. 5)

Claimant testified he is sensitive to cold temperatures in his left thumb and he has numbness from his thumb to his left wrist. Claimant also testified Mr. Brandon Long, owner of Beautiful Lawns by Long's, LLC, paid for claimant's surgery and for the anesthetic. The employer did not pay for the balance of the medical bills. Finally, claimant testified the cost of the examination and evaluation by Dr. Bansal was \$1,460.00.

RATIONALE AND CONCLUSIONS OF LAW

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 Hosp. 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. Dunlavy v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). 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). 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).

Claimant states he has symptoms that extend into the wrist. A wrist injury is an injury to the arm, not the hand. Holstein Elec. v. Breyfogle, 756 N.W.2d 812 (Iowa 2008).

Dr. Bansal rated claimant as having a 3 percent permanent impairment to the left arm. Claimant's injury is governed by Iowa Code section 85.34(2)(m). The sub-section provides:

m. The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm and the compensation therefore shall be weekly compensation during two hundred fifty weeks.

Therefore, claimant is entitled to 250 weeks X .03 percent = 7.5 weeks at the weekly benefit rate of \$382.18 per week. Said benefits shall commence from September 19, 2014.

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.

Claimant is entitled to healing period benefits for the period from July 8, 2014 through September 18, 2014. This is a period of 10 weeks and 2 days. Defendant shall take credit for the 3 weeks of wages paid to claimant at the rate of \$350.00 per week. Defendant shall pay all remaining healing period benefits at the weekly benefit rate of \$382.18 per week.

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 is the matter of the medical expenses claimant incurred to treat his work injury. 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 supplied a summary of the total medical expenses incurred, the amount paid by the employer, and the amount the employer has remaining to pay. Defendant is liable for all medical expenses that are causally related to this work injury.

Claimant is requesting

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 defendants:

Filing fee \$100.00

The cost of preparing Dr. Bansal's report which is estimated at \$500.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant seven point five (7.5) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of three hundred eighty-two and 18/100 (\$382.18) and payable from September 19, 2014.

Defendant shall pay unto claimant, ten (10) weeks and two (2) days of healing period benefits at the stipulated weekly benefit rate of three hundred eighty-two and 18/100 (\$382.18).

Defendant shall take credit for three (3) weeks of wages paid at the rate of three hundred fifty and no/100 dollars (\$350.00) per week.

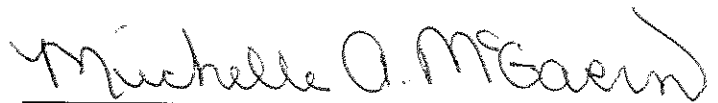
Defendant shall pay for all causally connected medical expenses to treat the left thumb as required by Iowa Code section 85.27.

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

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 13th day of March, 2017.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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MAM/kjw

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.