U.S. Department of Labor

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Issue Date: 13 April 2012

Case No.: 2011-LHC-01036

OWCP NO.: 02-166948

In the matter of

EDWARD CONNORS
Claimant,

v.

GLOBAL TERMINAL & CONTAINER SERVICES
Employer

and

SIGNAL MUTUAL INDEMNITY ASSN. LTD.
Carrier

Andrew R. Topazio, Esq.
For the Claimant

Francis M. Womack, III, Esq.
For the Employer

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA or the "Act"), 33 U.S.C. § 901, *et seq.*, and implementing regulations found at 20 C.F.R. Part 702, brought by the Claimant against his former employer. The Act provides for payment of medical expenses and compensation for disability or death of maritime employees, other than seamen, injured on navigable waters of the United States or adjoining areas.

I conducted a hearing on this claim on September 29, 2011 in New York City. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18.

At the hearing, Claimant's Exhibits (CX) 1 through 10, Employer's Exhibits (EX) 1 through 5, and Joint Exhibit (JX) 1 were admitted into evidence without objection. Transcript ("T".) at 3, 9-11. The record was held open after the hearing to allow the parties to submit additional evidence. T. at 12. By letter dated October 28, 2011, Claimant's counsel indicated that no further evidence would be submitted. *See* Claimant's counsel's letter of Oct. 28, 2011. The parties submitted closing arguments by February 17, 2012, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all Exhibits, the testimony at hearing, and the arguments of the parties.

STIPULATIONS

At the hearing, the parties entered into the following stipulations:

- The alleged accident occurred on September 21, 2007, on the premises of the Employer;
- The Claimant was injured while driving the Employer's truck, which struck a light pedestal;
- All parties are subject to the Act;
- An employee-employer relationship existed at the time of the accident;
- The injuries arose in the course of and within the scope of employment;
- Notice was timely;
- Medical benefits were provided pursuant to the Act;
- Disability was paid from September 25, 2007 through October 1, 2007, in the amount of $1,142.44;
- Average weekly wage is $2,688.27;
- The Claimant returned to work October 2, 2007; and
- Maximum medical improvement has been reached.

T. at 5-6.

These stipulations have been admitted into evidence and are therefore binding upon the Claimant and the Employer. *See* 20 C.F.R. § 18.51; *Warren v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988). Although coverage under the Act cannot be conferred by stipulation, *Littrell v. Or. Shipbuilding Co.*, 17 BRBS 84, 88 (1985), I find that such coverage is present here. I have carefully reviewed the foregoing stipulations and find that they are

reasonable in light of the evidence in the record. As such, they are hereby accepted as findings of fact and conclusions of law.

ISSUES

As discussed by the parties at the hearing, the issues remaining for resolution are as follows:

- What is the nature and extent of disability to the Claimant's left hand;
- Whether the Claimant is entitled to an award of disfigurement pursuant to § 908.20 of the Act for the scarring of his nose; and
- Whether future medical treatment, expenses, and attorney's fees are due.

T. at 6.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Disability Payments to Date

As mentioned above, medical benefits and disability from September 25, 2007 until October 1, 2007 have been paid. *See* T. at 6.

Summary of the Testimonial Evidence

The Claimant

The Claimant testified under oath at the hearing. He stated he injured his left wrist when the vehicle he was driving hit a cement pedestal. T. at 15, 31. An ambulance was called and the medics evaluated him. T. at 15. The Claimant stated the medics called his injuries "superficial." T. at 15. He stated he then went into the bathroom and noticed that his nose was split open. T. at 15. The Claimant testified he then drove himself to the Center State Medical Center, a medical care facility, near his home. T. at 15-16.

When asked to describe the nasal laceration, the Claimant pointed from between his eyes, down to the tip of his nose. T. at 17. He stated that he was referred to a plastic surgeon. T. at 17-18. He also testified to being told he had fractured his nose. T. at 18. When asked what about his facial appearance has changed as a result of the accident, the Claimant stated, "I could see the scar going down the middle and my nose is to the right a little bit, which it wasn't in the past." T. at 18. He also stated that the scar is more prominent when the skin on his face is darker due to cold weather or sunburn. T. at 20. He also stated that he was advised by his physician that he may need additional medical attention in the future to help with breathing issues. T. at 22. The Claimant stated he did not have any breathing difficulties at this time. T. at 22.

Regarding his left wrist, the Claimant testified that he was x-rayed at Center State Medical Center and instructed to wear a soft cast for approximately a week. T. at 23. He stated that the pain in his wrist gradually lessened in the weeks following the accident. T. at 23-24. The Claimant stated that when he moves his left wrist certain ways or does certain activities, he still feels pain. T. at 24. He also testified that this pain prevents him from working out like he used to, especially if an exercise involves heavy lifting. T. at 25. The Claimant stated that once aggravated, his wrist aches for several hours, and this pain has been typical for several years. T. at 26. He also stated his left wrist hurts when he writes, and that he is left-hand dominant. T. at 27-28.

The Claimant also testified via deposition on September 20, 2011. JX 1. Counsel for both parties was present. JX 1 at 2. At the deposition, the Claimant testified consistent with his testimony at the hearing.

Summary of the Medical Evidence

The parties submitted the following medical opinions and reports:

- Dr. Janet Parler's report dated October 29, 2007 stated the following: she examined the Claimant on September 21, 2007, and again during a follow-up appointment on October 4, 2007; there was no evidence of pre-existing injury, disease, or physical impairment in the Claimant; she observed a 3.5 centimeter laceration on the Claimant's nose and decreased airflow through the left nostril; further treatment was not necessary; she explained to the Claimant that he will have a permanent scar on his nose; she also informed the Claimant that if "difficulty breathing and decreased airflow through the left nostril persist," he should be re-evaluated without delay; Dr. Parler concluded that the "ultimate long term result" of the scarring of his nose cannot be accessed until one year post-injury. Dr. Parler's signature indicates she has a specialty in plastic surgery. CX 4.

- A radiological report, dated September 22, 2007, ordered by Dr. Cindy McVey, stated that x-rays taken of the nasal bones, left hand, and left wrist were all negative for fractures, dislocations, and other abnormalities. CX 7.

- The Operative Report of Dr. Parler, dated September 26, 2007. This report described the process of treating the nose laceration and stated Dr. Parler advised the Claimant to avoid heavy lifting for one week. CX 8.

- Dr. Kenneth E. Seslowe prepared a report dated October 18, 2010, and examined the Claimant that same day. Dr. Seslowe remarked on the Claimant's condition as follows: the Claimant explained how the work accident occurred and stated that he felt that both his nose and left wrist were primarily healed; the Claimant no longer sees a physician for these injuries associated with the accident; Dr. Seslowe reviewed the Claimant's medical records including the report of Dr. Parler[1]; upon observation, Dr. Seslowe noted the Claimant is left-hand dominant, has a "faint jagged laceration over the bridge of his nose

[1] Dr. Seslowe refers to the "operative report of Dr. Pardock."

measuring approximately 3 ½ cm," has no obvious deformity of the nose, has no difficulty breathing, complains of "minimal tenderness to deep palpation over the mid carpus," and that the left wrist has a similar range of motion to that of the right wrist. Lastly, Dr. Seslowe concluded, "My impression is a healed laceration of the nose and a resolved sprain of the left wrist. I feel he has permanency with respect to the left wrist and hand, and a scar about the nose." CX 9; EX 4.

- An addendum to Dr. Seslowe's report, dated November 18, 2010, stated: "Based on my examination of 10/18/10, the history and medicals reviewed, I feel he has a 0% of permanency of the left hand." CX 9; EX 5.

- Dr. Arthur H. Tiger, whose letterhead indicates he is Board-certified in orthopedic surgery, evaluated the Claimant on December 17, 2008 and prepared a report that same day. Dr. Tiger recounted the Claimant's accident history and medical treatment. He also noted the Claimant's complaints of discomfort in his nose and soreness in his left wrist. Dr. Tiger noted, upon observation, moderate swelling in the left wrist, as well as "loss of terminal degrees of dorisflexion and palmar flexion on the left as compared to the right" and "ulnar and radial deviation lacked terminal degrees as compared to the right." Lastly, Dr. Tiger assessed the nose injury as a 12% disability "of the whole person" and the wrist injury as a disability of 14% of the hand. CX 10.

- The report of Dr. Robert Dennis, written on February 9, 2009, regarding an examination that took place that same day. Dr. Dennis took a history of the accident, as well as work, social and medical histories, and reviewed the medical documentation submitted (including the reports of Drs. Parler and Tiger). He noted that the Claimant complained of "aching, and burning in his left wrist, especially if lifting weights, or writing for a long period of time," that his nose felt wider, and that he "feels he can hear himself breathe." Dr. Dennis included two pictures of the Claimant in his report with an accompanying statement: ". . . nasal bone revealed no indentation and no crookedness . . . straight nose with no evidence of visible laceration." Dr. Dennis also noted "no evidence of a definable objective abnormality in regard to either wrist," based on observing the Claimant's ability to flex, extend, grip, pinch and perform other tasks normally. He concluded that the permanency rating should be 0%, because, according to the American Medical Association guidelines, there are no objective findings or residual functional impairment. Dr. Dennis also gave the healed nose laceration a 0% disability rating. His letterhead lists him as Board-certified as an orthopaedic surgeon and an independent medical examiner. EX 3.

<u>Summary of Other Evidence</u>

Among the other evidence the parties presented, the following are of special note:

- The Claim for Compensation form, dated September 25, 2007. CX 1, EX 2.

- Notice of Final Payment of Compensation Payments, dated November 26, 2007. CX 2.

- The Employer's First Report of Injury, dated September 24, 2007. EX 1.

Injury Arising Out of Employment

As stated above, the parties have stipulated that the injuries to the Claimant's left wrist and nose arose out of and in the course of his employment with the Employer. *See* T. at 5-6.

Disability

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Care v. Wash. Metro. Area Transit Auth.*, 21 BRBS 248, 251 (1988). An injured employee's impairment may be found to have changed from temporary to permanent when the employee's condition reaches the point of maximum medical improvement (MMI). *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989).

Regarding the Claimant's left wrist, the parties have stipulated, and I find the record supports, that the Claimant has reached MMI. Therefore, I must determine to what extent, if any, the Claimant suffers disability of that wrist.

Discussion

Two physicians of record opined on the appropriate disability rating to assign to the Claimant's left wrist injury, Dr. Tiger and Dr. Dennis. Dr. Seslowe stated the Claimant had "0% permanency" but, I am unsure of how he is applying this terminology. As I cannot substitute my own opinion for that of a physician, I find Dr. Seslowe's opinion unclear as to what disability rating should be assigned.[2]

Dr. Tiger stated the Claimant had 14% disability of the left wrist, while Dr. Dennis stated there was none. Both physicians are Board-certified in orthopedic surgery. The two opinions both purported to use the American Medical Association guidelines, both were a result of examinations of the Claimant, and these two examinations were less than two months apart. The physicians have remarked, and I also note, that the Claimant's statements regarding his wrist injury have been quite consistent over time. This observation, I find, extends to his testimony, as well.

I give more weight to the opinion of Dr. Tiger, than that of Dr. Dennis. Dr. Dennis failed to account for Claimant's consistent subjective complaints. He stated in his report that there were no specific areas of tenderness in the Claimant's wrist, but Claimant's complaints involved discomfort after extended periods of use (i.e. writing for long periods of time or lifting heavy

[2] Dr. Seslowe acknowledges "permanency" as to the "left wrist and hand" (CX 9), but confusingly, concludes that Claimant "…has a 0% of permanency of the left hand" (id.).

objects). Dr. Tiger, however, explained deficiencies in the left wrist's range of motion that he stated contributed to the Claimant's current condition. I therefore determine that Dr. Tiger's disability assessment of 14% of the left wrist is the more probative. Accordingly, I find the Claimant entitled to that disability award for the injury to his left wrist.

Disfigurement

The Claimant requests compensation for the scar on his nose based on a theory of disfigurement.

Section 908(c)(20) of the Act allows for compensation to be paid for serious disfigurement of the face, head, neck, or of other normally exposed areas likely to handicap the employee in securing or maintaining employment. Before facial disfigurement can be compensable, I first must determine whether the scar is "serious" enough to justify an award. *See Woodham v. U.S. Navy Exch.*, 2 BRBS 185, 188-89 (1975).

Of the medical reports of record, Dr. Parler then stated, without recent update, she could not access the severity of the scar until one year had passed (CX 4); Dr. Seslowe observed a "faint jagged laceration over the bridge of his nose measuring approximately 3 ½ cm," and stated the Claimant has no obvious deformity of the nose (CX 9); Dr. Tiger accessed a 12% disability of the whole person based on observations of scarring, insensitivity, and potential breathing issues (CX 10); and Dr. Dennis included two pictures of the Claimant in his report with an accompanying statement: ". . . nasal bone revealed no indentation and no crookedness . . . straight nose with no evidence of visible laceration" (EX 3).

While the statutory framework on disfigurement cited above is certainly less than lucid or transparent, the intention of that statute may reasonably be assumed to include the "making whole," somehow somewhat, of the injured party. That is, to consider what degree of difference, in appearance-related terms, the worker has experienced as a result of his work injury.

Dr. Tiger's "whole person" effect[3] is estimated at 12%. My observance of the Claimant's scarring was that it was noticeable, not dramatically so, but noticeable nonetheless. There exists a deformity/scarring to Claimant's nose which he, himself, observes, as well as others. In other words, there is a difference in his recognition of himself from what existed prior to the work injury. *See* T. at 18-19. And, although apparently not directly relevant under the subject statute (*see* n.3, *infra*), Claimant's discomfort (T. at 18), insensitivity, and occasional breathing difficulties (CX 10), must bear upon the issue of whether the disfigurement is "serious."

Considering the foregoing, I find the disfigurement "serious" enough, within the meaning of § 908(c)(2) of the Act, to justify an award of $2,500.

Medical Expenses

Medical expenses in this matter have been paid. T. at 5-6.

[3] Inappropriately, he calls his estimate a "disability." CX 10 at 2.

Future Medical Treatment

Section 7(b) of the Act authorizes the Secretary through his designees to oversee the provision of health care. 33 U.S.C. § 907(b); 20 CFR § 702.407. Administrative law judges have authority to order payment for medical expenses already incurred, and generally to order future medical treatment for a work-related injury. They do not have the authority to specify a particular facility to provide future treatment. *McCurley v. Kiewest Co.*, 22 BRBS 115, 120 (1989).

Based on the testimony of Claimant, as well as recommendations by the physicians of record, I find it unnecessary in this case to award payment for future medical treatment associated with all injuries sustained. *See, e.g.*, T. at 22; CX 4.

Interest

Interest shall be assessed on all overdue medical expenses. *See Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75, 79-80 (1997). As there are no outstanding medical expenses in this case, I find no interest is due.

Attorney's Fees

Section 28 of the Act provides that an award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. 33 U.S.C. § 928.

Having successfully established the Claimant's right to compensation, the Claimant's attorney is entitled to an award of fees under section 28(a) of the Act. 33 U.S.C. § 928(a); 20 CFR § 702.134(a). *Maguire v. Todd Pac. Shipyards Corp*, 25 BRBS 299, 303 (2002).

The Claimant's attorney has not yet filed an application for attorney's fees. The Claimant's attorney is hereby allowed thirty days (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The parties have ten days following service of the application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The claim for benefits filed by the Claimant is GRANTED. I therefore ORDER:

1. The Employer pay permanent partial disability benefits for the disability of the Claimant's left wrist at 14%;

2. The Employer pay permanent disfigurement benefits relative to the nose injury in the amount of $2,500;

3. The District Director shall make all calculations necessary to carry out (1.) of this Order; and

4. The Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy on the Claimant and opposing counsel, who shall have ten (10) days to file any objections.

A

Ralph A. Romano
Administrative Law Judge

Cherry Hill, New Jersey