

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,

Claimant,

v.

RULE STEEL TANKS, INC.,

Employer,

and

ADVANTAGE WORKERS
COMPENSATION INSURANCE CO.,

Surety,

Defendants.

IC 2008-024772

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

Filed November 2, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on December 7, 2011. W. Breck Seiniger of Boise represented Claimant. R. Daniel Bowen of Boise represented Defendants. The parties submitted oral and documentary evidence at hearing, took post-hearing depositions, and submitted post-hearing briefs. The matter came under advisement on September 14, 2012 and is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 1

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant is entitled to prosthetic rehabilitation benefits for his right hand finger amputations; and
2. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant asserts that he is entitled to prosthetic silicone fingers as part of the reasonable medical care necessitated by his industrial injury, and attorney fees for Surety's unreasonable denial of the prosthetics.

Defendants argue that no physician has opined that prosthetic fingers are medically necessary for Claimant because they do not improve, and may actually impede, the residual function of Claimant's dominant hand. Since no physician has recommended the prosthetics, there is no basis for an award of attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, his father Alfredo Oliveros, and claims examiner Carole Carr taken at hearing;
2. Claimant's exhibits 1 and 2 admitted at hearing;
3. Defendants' exhibits 1 through 10 admitted at hearing;
4. The post-hearing depositions of MacJulian Lang taken December 15, 2011, and Dominic Gross, M.D., taken February 22, 2012.

All pending objections are overruled.

FINDINGS OF FACT

BACKGROUND

1. At the time of hearing, Claimant was twenty-one years of age and lived in Nampa with his parents and his younger sister.

2. At the time of his industrial accident, Claimant had not yet graduated from high school. In addition to his high school studies, Claimant worked part-time in a fast-food restaurant.

ACCIDENT

3. During his summer vacation in 2008, Claimant started a summer job at Rule Steel Tanks, Inc., where his father also worked. Claimant's job was operating a metal press that shaped pieces of steel. On Claimant's second day of work, July 30, 2008, he caught the fingers of his right hand in the metal press, resulting in a traumatic amputation of portions of all four fingers on his dominant hand, associated crush injuries, and some degloving injuries on what remained of his fingers.

MEDICAL CARE

4. Claimant was transported by ambulance to the emergency room, where Dominic Gross, M.D., a hand surgeon, was on call. Although the severed fingertips were recovered, they were not replantable because of significant soft tissue and bone damage in the residual fingers. Dr. Gross considered two options for treatment. The simplest approach would have been to perform a revision amputation of all four digits (the index, long, ring, and small fingers) just distal to the MP joint, but this would leave Claimant with a working thumb but no digits to work in opposition to the thumb to hold objects. A more difficult approach, but one that, if successful, would leave Claimant with some function in his right hand, was to preserve the remaining length

of his residual fingers by using skin grafts to rebuild the damaged digits. Claimant's parents opted for the latter approach.

5. Dr. Gross took Claimant to surgery where he debrided the open fractures, fused the PIP joint on the long finger, repaired proximal phalanx fractures on the index and ring fingers, and revised the amputation of the small finger. Dr. Gross used a skin flap from Claimant's forearm to cover the injured fingers. The radial forearm flap did not take, and Dr. Dominic then performed a procedure involving a right groin flap. This second procedure was successful, and following several additional surgeries, Claimant emerged with a right hand that includes an uninjured thumb, and portions of each of his four fingers.¹

6. By April 6, 2009, Claimant was medically stable, and Dr. Gross gave Claimant an impairment rating and imposed permanent restrictions related to the use of his right hand.

7. During his course of treatment Claimant did not ask Dr. Gross about prosthetic fingers and Dr. Gross did not raise the subject with Claimant.

PROSTHETICS

8. In December 2009, Claimant's counsel contacted defense counsel regarding how Claimant should proceed in order to acquire and trial appropriate prosthetic fingers. Claimant's counsel renewed this request in a number of letters and telephone conversations over the next several months. In October 2010, defense counsel advised Claimant's counsel that based on a conversation with Dr. Gross's PA, Dr. Gross would not prescribe the type of prosthesis Claimant was seeking. Several weeks later, defense counsel received a letter from Dr. Gross stating: "In

¹ Looking at the palm side of an intact right hand, there are three creases in each finger. The crease where the finger meets the palm is the MP joint, the next crease moving away from the wrist is the PIP joint, and the third crease is the DIP joint. Claimant has all three joints of his pinkie, the first two joints of his ring finger, one joint on his long finger, and two joints up to, but not including his DIP joint on his index finger.

my practice, I know of no prostheses that would improve his function, and do not routinely recommend them should the patient have functional use of the hand.” CE2, p. 16.

9. In March 2011, Claimant’s counsel initiated contact with Advanced Arm Dynamics (AAD), a company in Portland, Oregon, specializing in upper extremity orthotics and prosthetics. Counsel sought “an independent expert evaluation to determine if [Claimant] might be a candidate for prosthetic rehabilitation.” *Id.*, at p. 17. That same month, Claimant traveled to Portland to meet with MacJulian Lang, clinical director for AAD, for an evaluation.

10. Although Mr. Lang testified that he saw Claimant on a referral by Dr. Gross’s office, no other testimony or evidence of record supports this assertion. Mr. Lang met with the Claimant on one occasion, March 18, 2011. He examined Claimant, evaluated his functional use of the right hand, and eventually issued recommendations that Claimant be fitted with four silicone rubber finger prostheses. He transmitted these recommendations to Ms. Carr for approval. The anticipated cost of the finger prostheses, along with two heavy duty finger protectors, was estimated to be \$17,814.15. In his testimony, Mr. Lang speculated that the life span of the prostheses should be anywhere from three to five years before replacement was required.

11. In late August 2011, Claimant’s counsel wrote Dr. Gross seeking clarification of the doctor’s position regarding the medical necessity of prosthetic fingers for Claimant. Counsel noted that purely cosmetic procedures could be compensable under workers’ compensation statutes, inquired as to whether the doctor had reviewed Mr. Lang’s April report, and asked what counsel could do to facilitate a positive result for his client. Dr. Gross did not respond, and Claimant’s counsel contacted him again by letter dated November 1, 2011.

12. By letter dated November 1, 2011, Dr. Gross responded to Claimant's prior correspondence, stating:

I have reviewed [Claimant's] chart and your letters and I stand by my statement; that any prosthesis [Claimant] would get would not improve upon his functional use of the hand. Any prostheses would be for cosmetic purposes only, and while that can be important in a young patient, those patients for whom I have ordered finger prosthetics find them cumbersome, awkward, and time-consuming to use. Despite this fact, a prosthesis is not required for [Claimant] to be able to use his hand.

* * *

If I had felt at any time during his recovery that there were devices or prosthetics that would have improved his outcome and ability [to] use the hand, I assure you I would have prescribed such items as outlined in the Worker's [sic] Compensation Act that you so graciously provided to me.

[Claimant] is a delightful young man who has not let his injury define him. I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as part of a settlement in this case. But I stand by my original statement that the prosthetic devices are not required for [Claimant] to improve his functional use of the hand, and, [Claimant] understands that while it may help him "give some support", it was clear that he knew it would not significantly improve the use of the hand other than for looks.

Id. at p. 33.

13. On November 8, 2011, Defendants advised Claimant that they were not going to pay for the requested prosthetics as part of Claimant's medical benefits because his treating physician was "rather adamant" that they were not reasonably medically necessary. By way of an offer of settlement, however, Defendants offered to pay Claimant the initial cost of the prosthetics, the remainder of his impairment, and an additional consideration to resolve the matter via a lump sum settlement. Presumably Claimant declined the offer as the matter went to hearing the following month.

DISCUSSION AND FURTHER FINDINGS

14. In this proceeding, Claimant asks the Commission to order Defendants to pay for prosthetic fingers for Claimant now, and to maintain, repair, and replace the prosthetics throughout the course of Claimant's life. Claimant asserts that this care is of the type which an employer is required to provide under Idaho Code § 72-432. That section provides, in pertinent part:

(1) Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

(2) The employer shall also furnish necessary replacements or repairs of appliances and prostheses, unless the need therefor is due to lack of proper care by the employee. If the appliance or prosthesis is damaged or destroyed in an industrial accident, the employer, for whom the employee was working at the time of accident, will be liable for replacement or repair, but not for any subsequent replacement or repair not directly resulting from the accident.

It is to be noted that an employer's obligation to provide medical treatment to an injured worker is stated in the disjunctive. The first sentence of Idaho Code § 72-432(1) obligates employer to provide "reasonable" treatment of two kinds: 1) care required by an employee's physician, and 2) care needed immediately following an injury, and for a reasonable time thereafter. (*See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989); *Richan v. Arlo G. Lott Trucking, Inc.*, 2011 IIC 0008 (2011)).

15. The first question presented by the facts of this case is whether Mr. Lang, as the individual making the treatment recommendation, qualifies as "employee's physician." The term "physician" has a specific meaning under the Idaho workers' compensation laws. Idaho Code § 72-102(25) defines "physician" as follows:

"Physician" means medical physicians and surgeons, ophthalmologists, otorhinolaryngologists, dentists, osteopaths, osteopathic physicians and surgeons, optometrists, podiatrists, chiropractic physicians, and members of any other healing profession licensed or authorized by the statutes of this state to practice such profession within the scope of their practice as defined by the statutes of this state and as authorized by their licenses.

The state of Idaho does not license prosthetists and has no statutory framework that authorizes the profession within the meaning of Idaho Code § 72-102(25). Although Claimant asserts that Idaho does authorize prosthetists, Claimant fails to cite the Commission to any Idaho statute which "authorizes" this healing profession. Therefore, setting aside the question of whether Lang could be considered to be "employee's physician," it is clear that he cannot, in the first place, even qualify as a "physician" for the purpose of requiring certain treatment for Claimant as a physician under the first sentence of Idaho Code § 72-432.

16. Since Mr. Lang is not "employee's physician" under the first portion of Idaho Code § 72-432(1), Employer's responsibility for the payment of the care recommended by Mr. Lang must be evaluated under the second portion of Idaho Code § 72-432(1). Therefore, the question becomes whether the prospective care that has been recommended by Mr. Lang is "reasonable" care "needed" immediately following the injury, and for a reasonable time thereafter. The second portion of Idaho Code § 72-432(1) does not specify that "needed" care is restricted to care required by a physician. As we stated in *Richan, supra*, care that is "needed" is that care necessary to cure or treat an injured worker's injury and restore the injured worker's ability to engage in gainful activity. There is no reason to exclude cosmetic procedures/devices from the care that an employer could be required to provide, since even purely cosmetic treatment may be of assistance in restoring an injured worker's ability to engage in gainful activity. Here, notwithstanding the fact that Mr. Lang is assuredly not a physician, Lang's opinion on the efficacy of finger prostheses is one that he is qualified to give (See Lang Depo.,

pp. 5-9) and one that the Commission is entitled to consider in assessing Claimant's entitlement to this type of care. Mr. Lang is clearly of the view that the treatment he has recommended for Claimant is "needed" as we have construed that term, and for the purpose of further analysis, the Commission will assume that Claimant has met his burden of establishing that the care recommended by Mr. Lang is needed.

17. The next step in the process of determining whether Claimant is entitled to the needed care recommended by Mr. Lang, is to determine whether that care is "reasonable." This determination is one that is solely within the province of the Commission. What is meant by the term "reasonable" was addressed by the Court in *Sprague, supra*. In *Sprague*, the care at issue had already been rendered by the time the Industrial Commission heard the case. Under the peculiar facts of that case, the Supreme Court noted that the following facts supported the conclusion that the care in question was reasonable: (1) the treatment was required by claimant's treating physician; (2) claimant made gradual improvement from the treatment that he received; (3) the treatment which had been provided was within the physician's standard of practice, the charges for which were fair, reasonable and similar to the charges in the same profession.

18. The factors which the Supreme Court found important in *Sprague, supra*, are not before the Commission in this matter, since the care at issue is entirely prospective in nature. Whether the care recommended by Mr. Lang is "reasonable" must be judged by other factors, such as whether the proposed care is likely to be efficacious, and is of a type that finds support and acceptance in the medical community. *See, Richan v. Arlo G. Lott Trucking, Inc., supra*.

19. Dr. Gross does not believe that finger prosthetics are a reasonable medical necessity for Claimant. Dr. Gross discussed several reasons for his opinion in his deposition. First, Dr. Gross notes that Claimant retained some portion of all four fingers on his right hand.

His thumb was uninjured, and together with his thumb and his residual digits, he has a functional hand. While it is true that Claimant may not be able to do everything with his reconstructed hand that he did with his uninjured hand, the hand, as it is, is functional for many purposes. Dr. Gross opined that the proposed prostheses might make Claimant's hand *look* better, but they will not help it *function* better. Because the silicone fingers are flexible, they provide little by way of additional leverage and so do not markedly improve pinch or grip strength. They do not have "joints" and so cannot replicate the natural curvature of the fingers.

20. Dr. Gross has experience with many patients who use prostheses. He discussed the medical decision-making that goes into determining when prosthetics are medically necessary and when they are not. In those patients with multiple finger amputations, Dr. Gross has found that prosthetics are cumbersome, uncomfortable, do not improve function, and are often abandoned by the patient. He makes the point that in his medical decision-making, he has to balance both form and function. When a prosthetic provides both cosmetic and functional benefits, he is more likely to consider the prosthetic as reasonable and necessary care. However, on these facts, where form trumps function, a prosthetic is not reasonable or medically necessary.

21. Mr. Lang holds a certification issued by the American Board for Certification in Prosthetics and Orthotics. He is employed by Advanced Arm Dynamics, a national corporation specializing in prosthetic rehabilitation of individuals with upper limb loss. In his current position as clinical director for the company, he provides services as the primary prosthetist at the Portland, Oregon facility. He has extensive experience in evaluating individuals for prostheses, and fitting the same.

22. Mr. Lang testified that the prostheses would assuredly improve Claimant's functional use of the right hand in several areas. By restoring length and leverage, the prostheses

help restore more normal biomechanical function. They also serve to protect sensitive tissue at the amputation sites prone to breakdown. Finally, the devices serve a cosmetic purpose by restoring the hand to a more natural appearance. This final function may be more or less important depending on the psychological make-up of the patient. Mr. Lang expected that once fitted with finger prostheses, Claimant's grip strength would increase anywhere from 20-50%.

23. In determining whether Mr. Lang's recommendation for finger prostheses is "reasonable," it is necessary for the Commission to resolve the conflicting opinions of Dr. Gross and Mr. Lang on the suitability of finger prostheses for Claimant. Having carefully reviewed the testimony of both Dr. Gross and Mr. Lang, the Commission finds the opinion of Dr. Gross to be more credible. Although Dr. Gross has recommended finger prostheses for individuals with one missing digit, he was emphatic in stating his belief that the multiple amputations suffered by Claimant make him a poor candidate for prostheses. Dr. Gross convincingly testified that the devices would not only not improve Claimant's functional use of the right hand; they might even impede the function restored to Claimant's right hand by the surgical treatment provided to date by Dr. Gross. However, it is also true that Dr. Gross could not quarrel with the proposition that the prostheses serve a cosmetic purpose, and that for this reason alone, they might be suitable for an individual to whom appearance is important.

24. Nothing in the provisions of Idaho Code § 72-432 would prohibit the Commission from ordering an employer to provide procedures or prosthetic devices that are purely cosmetic in purpose. As acknowledged by Defendants, it is well within the ambit of Idaho Code § 72-432 to require an employer to provide, for example, scar revision surgery following an industrial burn or a prosthetic eye following an accident caused loss of an eye. Here, however, we are persuaded by Dr. Gross's testimony that the prosthetics in question would not improve, and

might actually impede, Claimant's residual hand function. While we do not doubt that Claimant would prefer to have a more natural looking hand, this is but one factor we must consider in determining the reasonableness of Mr. Lang's recommendation. The record clearly demonstrates that Claimant has thrived since the industrial accident. He has returned to school and to gainful employment, and in both of these settings he has found ways to deal with his severe injury, not only in terms of his loss of function, but also his disfigurement. Dr. Gross convincingly testified that the prostheses are at best useless, and at worse contribute to an even greater loss of function. We deem these factors to be more important than whatever cosmetic advantage the prostheses may offer. For these reason we find that the recommendation made by Mr. Lang for the finger prostheses is not reasonable. Defendants are not obligated to provide the care recommended by Mr. Lang.

ATTORNEY FEES

25. Attorney fees are not granted to a claimant as a matter of right under the Idaho Workers' Compensation Law. They may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides for an award of attorney fees to a claimant if the employer or surety contest a claim without reasonable ground, refuses to pay compensation provided by law, or discontinues payment of benefits without reasonable grounds. The decision that grounds exist for awarding a claimant attorney fees is a factual determination that rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

26. As Claimant failed to carry his burden of proving his entitlement to the prosthetics which were the subject of this proceeding, there is no basis for the award of attorney fees.

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing, the Commission hereby ORDERS:

1. The recommendations of Mr. Lang concerning Claimant's suitability for prostheses are not reasonable. Claimant is not entitled to the care proposed by Mr. Lang;
2. Claimant is not entitled to an award of attorney fees; and
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __2nd__ day of __November_____, 2012.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

/s/ _____
Thomas P. Baskin, Commissioner

/s/ _____
R.D. Maynard, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER** were served by regular United States Mail upon each of the following persons:

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ama

/s/_____