

May 17, 2005

LETTER DECISION AND ORDER

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RE: HF No. 56, 2003/04 – Patrick A. Nichols v. Highway Mail Company and Zurich, NA

Dear Counsel:

I am in receipt of Claimant's Motion for Temporary Total Disability Benefits, along with supporting argument and documentation. Employer/Insurer has provided a brief in resistance to Claimant's Motion, along with the affidavits of Gina Duffy and Lee Moran. I have carefully considered these submissions.

On September 19, 2000, Claimant was in a motor vehicle accident which occurred in the course and scope of Claimant's employment. Employer accepted compensability of claimant's work-related injury. Following the accident, Claimant sought and received extensive medical treatment. Claimant was off work and Insurer paid Claimant temporary total disability benefits in the rate of \$448 per week from April 19, 2003 to July 2, 2004, for a total of \$28,224.

Claimant has been assessed with a 10% impairment to the whole person due to his low back injury and an 18% impairment rating to the upper extremity. Based on these impairment ratings, Insurer paid Claimant and his attorney permanent partial disability benefits, in a lump sum, \$29,208.60 on September 22, 2004. Claimant filed his Petition for Hearing in this matter, seeking permanent total disability benefits, two days later on September 24, 2004. From April 19, 2003, to the present Insurer has paid Claimant

temporary total disability and permanent partial disability benefits in the sum of \$72,396.80. Claimant has not worked since April 6, 2003.

Claimant seeks temporary total disability benefits for the time he will be incapacitated from working after hardware removal surgery recommended by his surgeon, Dr. Alvine. Employer approved the surgical procedure proposed by Dr. Alvine and the hardware was removed from Claimant's back on March 8, 2005.

Claimant asserts that he is entitled to additional temporary total disability benefits, beginning with Dr. Alvine's December 2004 recommendation. Dr. Alvine's note of December 28, 2004, states as follows:

At this point [Claimant] is really struggling trying to get back to work force like he wants. He is trying as hard as he can. I think at this point we need to keep him on a sedentary job that will allow him to change positions every 20 to 25 minutes. If this is not available, he should remain off of work. He is applying for Social Security disability and I think he is a good candidate.

Employer argues that Claimant will not be incapacitated from working after his surgery. Dr. Alvine's notes are ambiguous on this point because he refers to Claimant's "regular activities" yet refers to Claimant's disability. Claimant's capabilities, both before and after the surgery, cannot be assessed on this record without extensive findings which are better assessed after an evidentiary hearing, especially given Claimant's claim of permanent total disability benefits in his Petition for Hearing. Claimant's Motion is denied.

This letter shall constitute the Department's Order.

Sincerely,

Heather E. Covey
Administrative Law Judge