

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

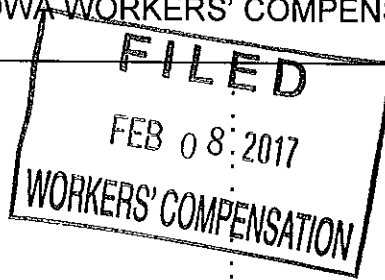
KAREE L. SCHERFF,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Employer,
Defendant.



File No. 5043562

ARBITRATION

DECISION

Head Note Nos.: 1803, 3202

STATEMENT OF THE CASE

Karee Scherff, claimant, filed a petition in arbitration seeking workers' compensation benefits from the Second Injury Fund of Iowa. The arbitration hearing was held on September 9, 2016 in Des Moines, Iowa.

The claimant provided testimony at the hearing. The evidentiary record also includes Claimant's Exhibits 1 through 8, and Second Injury Fund's Exhibits A through E, both of which were admitted into evidence without objection.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Counsel for the parties submitted post-hearing briefs on October 31, 2016, and the case was considered fully submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a qualifying first injury
2. The extent of industrial disability, if any.

FINDINGS OF FACT

At the time of the hearing, claimant, Karee Scherff, was 47 years old. (Tr. p. 9) She graduated from high school and later took classes at Iowa Central Community

College for less than a full academic year. She did not obtain a degree from that institution. (Tr. p. 10)

Claimant worked for Fort Dodge Animal Health, which was later purchased by the company that claimant currently works for, Boehringer Ingelheim. (Ex. B, p. 6) Claimant has worked at the same facility for about 19 years, albeit under different ownership. (Tr. p. 11) On October 22, 2008, while working for her employer, Fort Dodge Animal Health, claimant injured her left arm while working with a horse. (Tr. pp. 16-17) At the time of the hearing, she continued to work in the same position that she was in at the time of the October 22, 2008 injury. (Id.)

Claimant's job involves working with a number of different animals from mice to horses. (Tr. p. 14) Her day-to-day work may involve washing out dog runs, rounding up cattle, climbing in and out of cages, and sanitizing small animal cages, among other things. (Tr. pp. 14-15)

Following the October 22, 2008 injury, claimant received medical treatment with Timothy Schurman, M.D., at the Iowa Clinic. Dr. Schurman diagnosed a closed fracture of the proximal left scaphoid bone, which led to surgery. (Ex. 1, pp. 2, 5) She continued to have symptoms following surgery and saw Gregory Yanish, M.D., for a second opinion. (Ex. 4, p. 1)

Dr. Yanish examined claimant and stated his assessment as: "[l]eft wrist pain postoperative from proximal row carpectomy with remnant scaphoid and impaction on radial styloid." (Ex. 4, p. 2) On February 1, 2011, claimant underwent surgery with Dr. Yanish, which consisted of "post revision proximal row carpectomy, hemiarthroplasty." (Ex. 4, p. 4) On April 22, 2011, Dr. Yanish opined that claimant required permanent work restrictions of no lifting over 30 pounds with the left arm and no lifting over 60 pounds bilaterally. (Ex. 4, p. 5) Dr. Yanish also assigned a 39 percent impairment to the left upper extremity, based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 4, pp. 5-6)

On October 15, 2011, claimant reported doing fairly well. (Ex. 4, p. 8) However, on May 30, 2012, claimant returned to see Dr. Yanish "pointing to a new spot on her wrist," and complaining of "new" complaints of left wrist pain. (Ex. 4, p. 10) This was noted to be a ganglion cyst. (Ex. 4, p. 10) However, on July 24, 2012, Dr. Yanish stated that claimant also had wrist pain secondary to her left hemi wrist arthroplasty. (Ex. 4, p. 12) This led to yet another surgery, which was a wrist fusion, performed on May 16, 2013. (Ex. 6, p. 1) Dr. Yanish opined that claimant's condition and need for additional surgery was "without question" related to her original injury. (Ex. 4, p. 16) On November 14, 2013, Dr. Yanish assigned a 60 percent permanent impairment to the left upper extremity based on the AMA Guides, Fifth Edition. (Ex. 4, p. 22) On October 16, 2013, Dr. Yanish returned claimant to work "full duty with no restrictions . . ." (Ex. 4, p. 21) However, on November 27, 2013, he opined that claimant should have permanent restrictions of "lifting, pushing or pulling no more than 40 pounds with the right hand," (this presumably intended to be the left hand) and "no more than 60 pounds with the

right and left hands combined.” (Ex. 4, p. 23) In addition, she is to wear protective gear while working with cats. (Id.)

Claimant underwent an independent medical evaluation (IME) with Sunil Bansal, M.D., on June 13, 2014. (Ex. 7, p. 4) The report was issued by Dr. Bansal January 8, 2015. (Ex. 7, p. 31) In his report, he agreed with the 60 percent permanent impairment and restrictions assigned by Dr. Yanish. (Ex. 7, pp. 28-29)

Claimant, in her petition, asserted a first injury date of April 22, 2007. However, at hearing, at the close of evidence, claimant moved to amend the first injury date to July 24, 2000, to conform to proof. The Second Injury Fund did not object and the motion was granted. (Tr. p. 59)

Claimant alleges that she injured her right knee on July 24, 2000. She claimed that as time went on, her right knee continued to be bothersome in her leisure and exercise activities, which led to a doctor appointment in 2011. (Claimant’s Brief, pp.1-2; Ex. 3, p. 1; Ex. 5, p. 1) Claimant’s testimony at hearing discussed her right knee pain going back to 2000, and that since then, “it hurts on a daily basis.” (Tr. p. 22)

The medical records submitted at hearing indicate that on July 24, 2000, claimant was seen at Trimark Physicians Group for evaluation of right knee pain. The medical record states that she had been struck in the knee with a softball and had immediate swelling, bruising and pain, which “completely resolved over the next several days until Saturday . . . [she] had sudden onset of pain and swelling.” (Ex. 3, p. 1) Claimant was “worried that she might have a blood clot because someone she played with once had a clot in PE and died a year ago. She is otherwise doing well.” (Id.) Doppler testing revealed no evidence of a blood clot. (Id.) X-rays were also obtained and showed no signs of fracture, dislocation, joint effusion, loose body or osseous abnormality. (Ex. 3, p. 2)

Claimant had no further care for her right knee until nearly 11 years later, on May 19, 2011, which is over two and a half years after the alleged second injury. At that time, claimant presented to Matt Moritz, PA-C, with right knee pain stating that she is normally active, but has been “unable to work out for the last 5 days secondary to knee pain. She denies any specific isolated injury.” (Ex. 5, p. 1) At that time an MRI was recommended. (Id.) Claimant returned to Mr. Moritz on October 30, 2012 with increasing knee pain. The MRI showed “some chondromalacia, but no significant evidence of a meniscal tear.” (Ex. 5, p. 2) Mr. Moritz noted claimant had an antalgic gait, and stated that her knee pain “is probably due to her antalgic gait.” (Id.) At that time, a steroid injection was administered. (Id.)

Claimant returned to Mr. Moritz on August 6, 2013 and again on April 1, 2014 and received additional steroid injections to her right knee at both visits. (Ex. 5, pp. 3-4)

The treatment records from Mr. Moritz, do not make any reference to the 2000 softball incident, nor do they make any reference to pain that existed prior to the alleged second injury of October 22, 2008. The records do not discuss the injury as something that occurred, or had its origin, prior to October 22, 2008.

Dr. Bansal evaluated claimant concerning her right leg. (Ex. 7, pp. 1, 31) His evaluation and report were done in conjunction with the evaluation and report concerning claimant's left arm injury. (Ex. 7, p. 1) Concerning claimant's right leg, Dr. Bansal was asked "to evaluate her physical limitations and impairment associated with a prior condition to her right leg." (Id.) He was specifically asked to opine whether or not claimant had "suffered permanent partial impairment to her right leg? If so, what is the extent of that impairment expressed in percentage terms?" (Ex. 7, p. 2) In addition, Dr. Bansal was asked for his opinion concerning "[w]hat restrictions or limitations would you impose upon her as a result of this condition?" (Id.)

It is important to note that Dr. Bansal was not asked to address whether the knee condition was related to any particular incident or date of injury occurring before the alleged second injury on October 22, 2008.

Concerning the right leg, claimant reported to Dr. Bansal that her right knee continues to bother her and can be painful enough sometimes that she has to stop whatever activity she is doing and wait for the pain to subside. (Ex. 7, p. 25) She also reported her knee feeling weak and difficulty with kneeling and squatting. (Id.) Claimant reported being able to sit for only about 5 to 10 minutes before she feels her knee stiffening up, and the ability to stand for only about five minutes before she needs to move around. (Id.) Dr. Bansal, using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, concluded that claimant sustained a 3 percent impairment to the lower extremity based on atrophy of the thigh secondary to her chondromalacia and iliotibial band syndrome. (Ex. 7, p. 31) He then assigned a permanent restriction of no prolonged standing or walking for greater than 30 minutes at a time. (Id.)

Claimant confirmed at hearing that she had never been diagnosed with chondromalacia or iliotibial band syndrome prior to her left wrist injury on October 22, 2008. (Tr. p. 45) She further confirmed that she was first diagnosed with early chondromalacia of her right knee in May, 2011. (Tr. p. 46; Ex. 8, p. 1) Also, the records indicate that claimant's first complaints related to iliotibial band pain, was on April 1, 2014. (Ex. 5, p. 4) Therefore, the medical records do not support a finding that the conditions that Dr. Bansal relied upon to assess permanency, i.e. chondromalacia and iliotibial band syndrome, related to the July 24, 2000 softball incident or otherwise predated the October 22, 2008 alleged second injury.

Claimant testified at hearing that she had surgery on her right knee in December 2015. (Tr. p. 21) She described the surgery, stating that "[t]hey removed a band off the front of my knee that was causing pain, rubbing on – wearing down cartilage. And

then with my IT band on the side, they – I've gone to treatment for that. That shoots up into my hip." (Id.) This surgery was performed by an orthopedic specialist in Fort Dodge. Claimant testified that the surgery improved her condition "somewhat," although she continues to have pain on a daily basis. (Id.) There were no medical records submitted concerning this surgery or treatment from the orthopedist in Fort Dodge.

Dr. Bansal, who evaluated claimant on June 13, 2014 and issued his report on January 8, 2015, would not have had access to claimant's most recent medical records, including her surgery in 2015 and any treatment thereafter. Therefore, Dr. Bansal has not been afforded the opportunity to review said records and evaluate claimant after her December 2015 surgery to consider how her "somewhat" improved condition would impact his opinion of permanency. (Tr. p. 21)

Claimant did not have any medical treatment for her right knee for almost 11 years, from July 24, 2000, until May 19, 2011. (Ex. 3, p. 1; Ex. 5, p. 1; Tr. p. 42) Claimant testified that she had other medical concerns that took her focus off of her right knee, but admitted that she had health insurance through her employer during the period of time in question. (Tr. pp. 22, 42)

Claimant testified in her deposition taken on July 22, 2016, that after the softball incident in 2000, she returned to her employer and continued in the same job, without restrictions. (Tr. p. 42)

The MRI report that was obtained on May 23, 2011 notes a clinical history of "right knee pain for 1 month." (Ex. 8, p. 1) Claimant explained at hearing that this was her answer to being asked how long the pain had been going on "to where I couldn't tolerate it anymore . . ." (Tr. p. 43) However, this explanation does not relate the condition to the July 24, 2000 softball incident or any other date prior to October 22, 2008.

Claimant stated in her deposition on July 22, 2016, that the knee pain that prompted her to seek medical treatment on May 19, 2011 started in about the summer of 2009. (Ex. B, pp. 4, 11) This contradicts claimant's hearing testimony.

Also, claimant stated in April 2013, in her sworn answers to interrogatories propounded by the employer, that: "I have recently had an injection in my right knee. I believe this right knee condition started in 2011. I have been treated by Dr. Moritz . . ." (Ex. D, pp. 20, 21) This also contradicts claimant's hearing testimony.

At hearing, claimant testified that the right knee condition dates back to the softball injury in 2000. (Tr. pp. 19-20)

There is no medical testimony relating claimant's knee condition to the alleged injury date of July 24, 2000, or any other date prior to the alleged second injury on October 22, 2008. Claimant's medical history, her work history, her deposition testimony and her answers to interrogatories are found by the undersigned to be more

persuasive than claimant's hearing testimony concerning the origin of her right knee injury.

I find that based upon the above, claimant, indeed may have a right knee condition that has resulted in permanent impairment. However, I am unable to find based on the evidence presented, that the knee condition is related to the alleged first injury of July 24, 2000. Claimant's testimony at hearing that she has had daily pain in her right knee since 2000 is overcome by the fact that claimant has reported three different dates of origin of her knee condition, only one of which pre-dates the alleged second injury. Although she had a single evaluation in July, 2000, she had no other medical attention for nearly 11 years concerning the knee, until May, 2011, which is two and a half years after the alleged second injury. Dr. Bansal does not tie claimant's current knee condition to the alleged first injury of July 24, 2000, and did not have the benefit of evaluating claimant after her December 2015 surgery to determine how her improved condition may impact a finding of permanency. The record does not support a finding that claimant sustained a qualifying first injury. I find that claimant has failed to carry her burden that she sustained a qualifying first injury.

CONCLUSIONS OF LAW

The primary disputed issue in this file is whether claimant sustained a qualifying first injury, such that second injury fund benefits are triggered.

Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have previously lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, Section 17:1, p. 211 (2014-2015).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability.

Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

I have found above that claimant has failed to carry her burden of proof that she sustained a qualified first injury because she has failed to establish a "previous" loss of use of a qualified member before the second injury occurred.

Having found that claimant has failed to carry her burden of proof concerning the establishment of a qualifying first injury, the remaining issue of the extent of industrial disability is moot.

ORDER

IT IS THEREFORE ORDERED:

Claimant shall take nothing.

Each party shall pay their own costs.

Signed and filed this 8th day of February, 2017.



TOBY J. GORDON
DEPUTY WORKERS'
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TJG/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.