BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 15 2018
WORKERS' COMPENSATION

TONY MACK,	:	File No. 5052951
Claimant,	:	ARBITRATION
vs.	:	DECISION
SECOND INJURY FUND OF IOWA,	:	
Defendant.	:	Headnotes: 1803, 1804, 3200, 3202

STATEMENT OF THE CASE

On August 31, 2015, Tony Mack filed a petition in arbitration seeking workers' compensation benefits from Ryan & Associates, employer, and Illinois National Insurance Co., insurer. On October 24, 2016, claimant filed a second petition asserting entitlement to benefits from the Second Injury Fund of Iowa. On November 9, 2016, claimant entered into a settlement with Ryan & Associates and Illinois National Insurance Co. leaving only the claim against the Second Injury Fund of Iowa to be heard.

The hearing regarding entitlement to benefits from the Second Injury Fund of Iowa took place on December 19, 2017. The record consists of Joint Exhibits 1-9, Claimant's Exhibits 1-8, and Fund Exhibits A-E along with the testimony of claimant. The record was closed as of December 19, 2017, and the matter was considered fully submitted upon the simultaneous filing of briefs on January 9, 2018.

ISSUES

1. Whether claimant sustained a first qualifying injury;
2. Whether claimant sustained a second qualifying injury;
3. And if so, the extent of claimant's industrial disability.

STIPULATIONS

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.

The parties agree claimant was paid 17.6 weeks of permanent partial disability benefits from defendant employer and insurer beginning July 25, 2015, through November 26, 2015, at the rate of $1250.64.

The parties further agree that at the time of the alleged injury, claimant's gross earnings were $2380.00 per week. He was single and entitled to one exemption.

FINDINGS OF FACT

Claimant was a fifty-eight year old person at the time of the hearing. He has a high school diploma received in 1977. His post-secondary education consists of a pipefitter apprenticeship lasting approximately five years. For the past twenty plus years, claimant has worked as a pipefitter.

Prior to pipefitting, claimant served in the Air Force as a security/police personnel, which required him to be on his feet approximately 95 percent of the time. He also worked as a carpenter, an AT&T operator, and a flatbed truck driver, a dump truck driver.

As a union pipefitter, he worked a variety of projects around the country. Most of the jobs last two to three months. His last employment was in Indiana in July of 2016. He primarily worked gas lines which involved heavy lifting of pipes, fitting of those pipes and welding. Claimant began receiving Social Security Disability (SSD) benefits on June 2016, dating back to July 2015. (Ex 2:15)

He earned approximately $27.00-$46.00 per hour, working 60-70 hours a week, seven days a week.

He testified at hearing that he did not use the computer regularly.

In 1971, claimant was playing football with friends. He was tackled and his ankle was broken. His treatment consisted of casting and crutches. He testified that the ankle has been painful since the break but that he blocked out the pain. At times, he would elevate his ankle with a pillow to ease the pain and help him sleep.

Relevant past medical history includes complaints of right knee pain in September 2014, a year prior to his work injury. (JE 1:1) X-rays revealed no acute fracture but some osteoarthritic changes and a small effusion. (JE 1:10) He was diagnosed with internal derangement of the right knee, given a one-day work release, and ordered to follow up as necessary. (JE 1:8)

On or about July 24, 2015, claimant tripped over a pipe. In the process of catching himself, he twisted his knee. He kept working but after a few days, it became so painful he could no longer perform his job duties. His supervisor sent him to the hospital.

He was seen in the emergency room of Fort Madison Community Hospital on July 29, 2015. He was given hydrocodone and a wrap and referred for additional treatment. He followed up with Rachel Oliverio, D.O. on July 31, 2015. (JE 3:11) Dr. Oliverio was able to reproduce pain with both varus and valgus testing. (JE 3:12) Claimant was also observed to be mildly antalgic in his gait. *Id.* After a review of the emergency room records and her own examination, Dr. Oliverio concluded that further testing should be performed. *Id.* She returned claimant to regular duty with orders to take ibuprofen up to three times per day and to wear a neoprene knee sleeve. *Id.*

During his annual physical at the Maxwell Family Health Clinic, claimant's right knee pain was noted.

> Right knee joint pain in the medial aspect, knee joint swelling on the right, and the knee suddenly buckled on the right.

(JE 4:13)

Claimant was given a brace and instructed to return for an MRI after December when he became eligible for certain insurance coverage. (JE 4:16) On December 1, 2015, claimant's referral for an MRI was made. (JE 4:17) The MRI was conducted on December 10, 2015, which revealed severe degenerative joint disease in three compartments, severe synovitis with some synovial chondromatosis as well as multiple large loose bodies and a tear at the posterior horn of the medial meniscus. There were also signs of a bone spur of developmental osteochondroma. (JE 5)

Claimant was then referred to Loren James, M.D., wherein a possible knee replacement was discussed as well as arthroscopy to remove the pain from the meniscal tear along with conservative treatment with physical therapy and/or injections to stave off the knee replacement. (JE 6:28) Dr. James imposed restrictions until after the surgery. (JE 6:29) Surgery took place on January 11, 2016. In the operating note, Dr. James noted "He did not have knee pain before this Worker's Compensation injury, so according to that this arthritis was being [sic] going on for a very long time based on what he is saying we should be able to get him back to functioning like he was before he fell at work." (JE 6:32)

During surgery, Dr. James discovered significant quadriceps atrophy, crepitus, and other signs of degeneration and arthritis, including a chronic tear of the ACL. (JE 6:32-34) In the post-operative appointments, Dr. James reiterated that physical therapy would be of benefit to the claimant but because of claimant's work schedule, he did not participate in that treatment. (JE 6: 39)

In the intervening time, claimant was diagnosed with colon cancer and underwent partial colon resection. As a result, claimant was not able to focus on his knee. During the March 13, 2016, visit with Dr. James it was recommended that the weakness and stiffness could be treated with physical therapy. (JE 6:40)

Due to the surgery and claimant's subsequent return to work, therapy goals were not met. On April 24, 2016, Dr. James wrote, "The amount of therapy he ever went to is minimalistic secondary to his cancer and the fact that now he is working 12 hours a day, 7 days a week." (JE 6:41) Per the testimony of claimant, this was a two month position in Jacksonville, Florida, and he was not required to do any heavy lifting. His co-workers handled that for him. It took him three to four weeks to recover from this position. During the April examination with Dr. James, claimant exhibited range of motion from 0 to 120 degrees, mild effusion, weakness in quad control and hip abductors, patellofemoral crepitus and medial pain. (JE 6:41) Dr. James felt that it was unlikely claimant's condition could resolve given claimant's work schedule. Dr. James also felt, "that his line of work definitely could have contributed to what is going on." (JE 6:41)

Claimant underwent an IME on August 12, 2016, with Marc Vander Velden, PT. (JE 7) Claimant put forth full effort and the test was deemed valid. The results are as follows:

> Based on results obtained Mr. Mack is able to perform within the LIGHT Physical Demand Category of work with occasional lifting below waist height to 20 pounds. Mr. Mack lifted 13 pounds to shoulder height and 12 pounds overhead. Mr. Mack carried 15 pounds. Pushing abilities were evaluated and Mr. Mack pulled 20 horizontal force pounds and pushed 30 horizontal force pounds respectively.
>
> Non-material handling testing indicates Mr. Mack demonstrates an occasional tolerance for Above Shoulder Reach, Dynamic Balance, Static Balance, Bending. Fine Coordination, Firm Grasping, Gross Coordination, Pinching, Simple Grasping, Squatting, Standing and Walking.
>
> Mr. Mack demonstrated the ability to perform Forward Reaching and Sitting with frequent Tolerance.
>
> The functional activities Mr. Mack should avoid within a competitive work environment include Crawling, Repetitive Kneeling, Sustained Kneeling and Stair Climbing.
>
> Mr. Mack is able to perform sitting frequently and standing occasionally throughout his workday. Standing needing to change position within 15 minutes.
>
> Overall, client had difficulties with tasks that involved deep knee flexion. His range of motion deficits along with increase pains caused difficulties in walking and stairs. Client did not wear brace during testing although he normally does for support during the day. Client had some mild left ankle strength deficits due to past injury. He also demonstrated decreased left grip strength. Client self reported at the end pain dispersed into right knee and leg along with weakness.

(JE 7:1)

Claimant also underwent an IME with Sunil Bansal, M.D., on August 12, 2016. (JE 8) In the ensuing report, Dr. Bansal determined claimant had ongoing problems in claimant's left ankle and right knee. (JE 8)

Claimant reported constant right knee pain, worsening upon use. He had popping, locking, and giveaway symptoms on the right. He also complained of numbness and tingling of the right leg from the knee down to the calf. On the left, he had occasional difficulty walking, achiness with wet weather and some weakness of the ankle on uneven terrain. Overall, claimant could lift 20 pounds occasionally, sit for 30 minutes, stand in place for 15 minutes and walk for a couple of blocks. (JE 8:65)

Dr. Bansal measured some reduction of range of motion in the right lower extremity and weakness. On the left ankle, there was some tenderness and swelling. (JE 8:66)

Dr. Bansal concluded claimant sustained tears in his medial and lateral meniscus along with an aggravation of the degenerative joint disease on the right knee and a left ankle fracture. For the right knee, Dr. Bansal assigned a 16 percent lower extremity impairment rating and for the left ankle, a 2 percent lower extremity impairment rating. (JE 7:70)

Phil Davis, M.S., performed a records review for the purpose of issuing a vocational opinion. (Ex. 1) He also conducted a telephone interview with the claimant. *Id.* The report was issued August 23, 2016. *Id.*

Using the work restrictions in the FCE report, Mr. Davis concluded that claimant would not be able to return to "his past gainful employment activities." (Ex. 1:7) Mr. Davis relied on the conclusion that claimant's deficiencies would place him in the sedentary physical demand level because of "difficulties with tasks that involved deep knee flexion" along with mild strength deficits due to past injury to his left ankle. (Ex. 1:6) It was not immediately clear why problems with deep knee flexion would move claimant outside of the light duty category.

Light duty is described by Mr. Davis as follows:

> 20 pounds maximum lifting with frequent lift/carry up to 10 pounds. A job is light if less lifting is involved but significant walking/standing is done or if done mostly sitting, but requires push/pull on arms or leg controls.

(Ex. 1:6)

There is nothing in the above description that would disqualify him from light duty either because of a mild left ankle weakness nor deep knee flexion. Mr. Davis' conclusions are not fully adopted for the reason that they are not clearly explained or buttressed by evidence in the record.

The Fund retained the services of Rene Haigh, MS, to offer a vocational opinion. (Ex. B) Ms. Haigh concluded claimant had the skills to work selective light physical demand activities. (Ex. B:29) She based this opinion on the lack of official restrictions imposed by Dr. James and claimant's post-injury behavior in which he returned to work in a full-time capacity up until May 2016. (Ex. B:31) After the Jacksonville position, claimant attempted another job in Indiana. It was forty hours per week and two to three weeks long. He has not been able to work since that time.

In his SSD application, claimant listed right knee injury, colon cancer, arthritis in both knees, and high blood pressure as the basis for his alleged disability. He described having difficulty putting on socks while standing, needing assistance in and out of the tub, having a hard time sitting and rising from the toilet. (Ex 3:17) He was able to assist with household tasks as long as he did not need to move. (Ex. 3:18) He claimed that he stopped working July 1, 2015, which was not accurate. (Ex. C:34)

Initially, claimant's SSD was denied because it was determined that claimant had the capacity to work in an unskilled medium level work activity. (Ex. 5:27) The decision was appealed and claimant was rendered disabled due to a finding that claimant's skill set was not transferable to many occupations and given his age, it would be unlikely he would find new employment. (Ex C:45)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Iowa Code 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 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); Lawyer and Higgs, Iowa Workers' Compensation-Law and Practice, § 17-1.

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).

> To invoke Fund liability, the first injury need only be a scheduled injury. See Braden, 459 N.W.2d at 470. Because a scheduled injury is evaluated by determining the loss of physiological capacity of the body part, not by evaluating the impairment of the earning capacity, the first injury does not have to result in an industrial disability to constitute a "loss of use" under section 85.64. The injury to Bergeson's right knee resulted in a scheduled injury to his right leg. There is substantial evidence to support the commissioner's finding that Bergeson suffered a ten percent loss of use of his right leg from the first injury.
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> Second Injury Fund of Iowa v. Bergeson, 526 N.W.2d 543, 548 (Iowa 1995)

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).

The Fund defends this case on two fronts. It argues that claimant sustained neither a first nor a second qualifying injury.

The claimant asserts the first qualifying injury is the left ankle break he sustained as a child. There is no dispute that claimant suffered a break. However, since the break, claimant has gone on to perform physically rigorous work for most of his adult life including laborer, construction, and pipefitting. Even his position in the Air Force as security personnel required regular walking on patrols. There are no medical records evidencing any physical difficulty with claimant's left ankle prior to the IME report of Dr. Bansal.

Problematically, Dr. Bansal's opinion affirmatively assessing an impairment rating to the left ankle cannot be ignored. Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Claimant testified that he has always had problems with the left ankle but merely learned to compensate for the pain. Based on the credible testimony of the claimant and the unrebutted expert opinion of Dr. Bansal, it is found claimant has a first qualifying injury.

The question now turns to whether claimant incurred a second qualifying injury. Defendants argue that not only was the claimant's knee injury necessitated by a non-work injury, but that if his work injury is found to be compensable under the statute, the industrial disability is not substantial.

The diagnosis made by claimant's treating physician, Dr. James, was degenerative disease and arthritis. Dr. James noted in the surgical report that claimant's arthritis existed prior to the fall; however, he also believed that claimant was asymptomatic prior to the fall and could be returned to the pre-fall condition. In a later office note, Dr. James recognized that claimant's recovery from the colon cancer was inhibiting full recovery from the work injury but also blamed claimant's lingering problems on his work activities. Dr. Bansal affirmatively found that the claimant's right knee injury and subsequent sequelae were related to the work injury of July 24, 2015. There is no medical opinion that contradicts or rebuts Dr. Bansal's opinion. Dr. James did not provide a formal opinion but scattered throughout his medical records are references to work either exacerbating or contributing to the work injury. While claimant did have a history of right knee pain prior to July 24, 2015, this pain was attributed to his work as well.

Therefore, based on the uncontroverted opinion of Dr. Bansal, supported by the notes of Dr. James, as well as the testimony of the claimant, it is found that claimant has sustained a second qualifying injury entitling him to benefits from the Fund.

The next issue to be resolved is the extent of claimant's cumulative industrial disability. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

The focus of an industrial disability analysis is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995), Anthes v. Anthes, 258 Iowa 260, 270, 139 N.W.2d 201, 208 (1965). Changes in actual earnings are a factor to be considered, but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmquist v.

Volkswagen of America, Inc., 261 N.W.2d 516, 525, (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, §§ 81.01(1) and 81.03. The loss of earning capacity is not measured in a vacuum. Such personal characteristics as affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Loss of future earning capacity is measured by the employee's own ability to compete in the labor market.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges, 528 N.W.2d 614, 617. Ending a prior accommodation is not a change of condition warranting a review-reopening of a past settlement or award. U.S. West v. Overholser, 566 N.W.2d 873 (Iowa 1997). However, an employer's special accommodation for an injured worker can be factored into an award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, employers must show that the new job is not just "make work" but is also available to the injured worker in the competitive market. Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

Claimant had a valid FCE which placed him in the light duty work category. The FCE was adopted by Dr. Bansal. Dr. Bansal does not consider to what extent claimant's loss of strength was attributable to the colon surgery and subsequent recovery. Dr. James suggested that the cancer treatment and recovery sapped claimant's energy and prevented him from participating in physical therapy. Timing wise, claimant returned to full-time work after the knee surgery and after the colon resection surgery, ultimately retiring sometime in June of 2016. Dr. James noted on April 21, 2016, that claimant was working 12 hours a day, 7 days a week. Claimant testified that he informed his employer of his work injury and that they accommodated him. Regardless, the position was physically taxing and claimant was not able to do another job until May 2016. After one more job in Indiana, claimant opted not to seek out further union jobs, testifying that the physical exertion was too much even with accommodations.

Claimant was clearly motivated to return to work and did his best to perform his pre-injury duties, but ultimately, his position as a pipefitter was not feasible given the pain, loss of strength and reduced range of motion in the right knee. I do not find that claimant's return to work was evidence that he had no symptoms from the work injury but rather that claimant did his best to provide an income for his family which, in the end, was not sustainable.

He is fifty-eight years of age. He has little education and no computer experience.

While Mr. Davis' finding that claimant's inability to deep flex his knee moved claimant from light duty into sedentary work was given little weight, Ms. Haigh also found that there was only a small subset of light duty positions claimant would be able to perform given his injury, work experience, and education. Given claimant's motivation to return to work, his significant work restrictions placing him in light duty to sedentary work activities, his age, education, and background, it is determined claimant is permanently and totally disabled.

ORDER

THEREFORE, it is ordered:

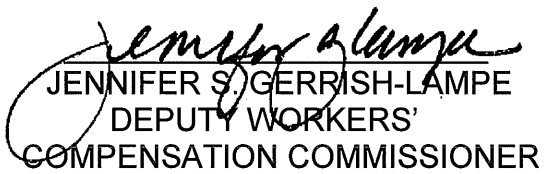
That defendant is to pay unto claimant permanent total disability benefits at a rate of three hundred thirty-eight and 02/100 dollars ($338.02) commencing November 27, 2015, and continuing during the period of permanent total disability.

That defendant shall pay accrued weekly benefits in a lump sum.

That defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 15th day of March, 2018.



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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.