

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

| | | |
|-----------------------------|----------------------|---|
| DAVID GLAUSSER, | FILED | File No. 5065874 |
| Claimant, | OCT 23 2018 | |
| vs. | WORKERS COMPENSATION | ARBITRATION |
| SECOND INJURY FUND OF IOWA. | | DECISION |
| Defendant. | | Head Note Nos.: 1108.50; 1402.40; 1803; 3202; 3203 |

STATEMENT OF THE CASE

David Glausser, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tricon General Construction, employer, and Integrity Mutual Insurance Company, insurance carrier, and the Second Injury Fund of Iowa as defendants. Hearing was held on August 30, 2018 in Des Moines, Iowa. Prior to the hearing, the claimant reached a settlement with the defendant employer and insurance carrier. The only remaining parties at the time of the arbitration hearing were the claimant and the Second Injury Fund of Iowa.

Claimant, David Glausser, was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE9, claimant's exhibits 1-6, and defendant's exhibits AA-HH. Administrative notice was taken of the Agreement for Settlement (AFS) reached between the claimant and defendant employer and insurance carrier.

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.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant's October 1, 1990 injury is a first qualifying injury for purposes of Second Injury Fund liability?
2. Whether claimant is entitled to Second Injury Fund Benefits, and if so, what extent?
3. The amount of credit the Second Injury Fund is entitled to.
4. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, David Glausser, was in his mid-forties at the time of the hearing. He graduated from Dubuque Hempstead High School in 1991. (Ex. AA, p. 3) After high school he attended community college. He took courses in economics, accounting, and marketing. He did not obtain a degree. (Testimony)

While in college, Mr. Glausser worked as a bouncer at Hooligans. His duties included checking IDs, collecting money from customers, and removing unruly customers. In 1996, he began working for Accurate Carpentry which specializes in building new homes. He was responsible for stick framing. This job required him to walk and balance on 4-inch-wide boards which were up to 15 feet in the air. He worked there for approximately five months. He left that job to move to warmer climate. (Testimony)

In January of 1997, Mr. Glausser moved to Florida and began working for Durkin Homes. His cousin is the owner of this business. Mr. Glausser started as a carpenter and worked on building several homes. He later received his Class A General Contractors License and graduated to the position of lead contractor. The lead contractor was responsible for laying out the entire project, including laying out the slab, forms for contract, carpentry framing, and identifying the location of cabinets, windows, and doors. He estimated that he earned approximately \$1000 per week. (Testimony; Ex. AA, p. 4)

After a few years of working for Durkin Homes, Mr. Glausser started his own business designing and building custom homes. He ran this business for approximately three years before he closed the business. He closed the business because he had a difficult time finding subcontractors to complete the work and eventually had to finish his last three homes himself. This work included plumbing, hanging fixtures, and tiling floors. (Testimony)

He then went to work for Joseph Miranda who owned a construction company. The company specialized in large commercial projects such as large office warehouses, hotels, medical complexes, dorms, and dentist offices. Mr. Glausser was the project manager and supervisor. He also had a contractor's license and served as the company's "qualifier" for projects. He was responsible for lining up utility work to subcontractors to pricing out everything. He worked as many as 100 hours per week. (Testimony)

Since 2014, he has lived in Dubuque, Iowa with his two sons. When Mr. Glausser initially returned to Iowa he worked for his brother-in-law's mechanic shop. His duties included changing tires on semis and some general cleaning. (Testimony)

He was hired to work for Tricon as a project superintendent on May 7, 2014. A project superintendent is an onsite supervisor that directs contractors, orders materials, maintains, moves projects along, and coordinates between the different trades. Tricon agreed to pay him \$1,000 per week for his first year as a trial period. The agreement was that after one year on the job they would discuss increasing his pay. Mr. Glausser worked as a superintendent until January 5, 2016 when he left to work on a construction project with Joseph Miranda, a former employer. They partnered together on a project to build a college dormitory. Mr. Glausser worked on that project until it was completed in August of 2016. He made around \$140,000 on the project. (Testimony, Ex. AA, p. 4, Ex. GG, p. 47)

Mr. Glausser returned to work at Tricon as a project superintendent in October of 2016. He was still there at the time of the hearing and was supervising a new aquatic facility in Dubuque. Mr. Glausser was working full duty without restrictions from a medical provider. Mr. Glausser testified that he is paid \$55,000 per year. Jeff Keuter, claimant's supervisor, indicated that Mr. Glausser was making \$58,000 per year. Mr. Glausser has not applied for any other jobs since he returned to Tricon in October of 2016. (Testimony, Ex. BB, p. 9, Ex. GG, p. 47, Ex. HH, depo. p. 18)

First alleged qualifying injury

Mr. Glausser sustained an injury to his right knee on October 9, 1990 while playing high school football. He has alleged that this is his first qualifying injury for purposes of seeking benefits from the Second Injury Fund of Iowa (the "Fund"). An MRI revealed an ACL tear and a lateral meniscus tear. (JE1, p. 2) Dr. Schemmel performed reconstructive surgery on October 21, 1990; he used a patellar tendon graft. (JE2, pp. 4-7). Due to the nature of the tear, Dr. Schemmel also removed a portion of the lateral meniscus. As a result of the injury and procedure, Mr. Glausser was aware that the "meniscus will have very little function in regards to resisting stresses . . ." (JE2, p. 5) Mr. Glausser was not allowed to play high school football ever again. Additionally, he was restricted from gym class for the remainder of his senior year. Mr. Glausser returned to see Dr. Schemmel in 1994. Dr. Schemmel noted that the patient had an ACL reconstruction which included a substantial lateral meniscectomy. The doctor noted full range of motion in Mr. Glausser's right knee. He noted other changes and stated that Mr. Glausser was at high risk for lateral compartment degenerative changes. Dr. Schemmel instructed Mr. Glausser not to overstress his knee in terms of activities. He also advised him to return if he had any additional issues with his right knee. Mr. Glausser did not seek any treatment for his right knee since that 1994 appointment. (Testimony, JE1, p. 6)

Mr. Glausser testified that since he injured his right knee he has always tried to protect that knee. He would use his left leg to bear weight when he stepped or jumped down from stairs or from a ladder. Also, while performing weight-bearing activities he would try to protect his right leg. (Testimony)

At the request of his attorney, Mr. Glausser saw Mark Taylor, M.D., on August 11, 2016 for an IME. Dr. Taylor opined that the football injury had caused permanent disability to Mr. Glausser's right lower extremity. Dr. Taylor assigned 7 percent impairment to Mr. Glausser's right lower extremity due to the ACL injury and reconstruction and 2 percent impairment to the right lower extremity due to the partial meniscectomy. The combined value of the impairment ratings is 9 percent impairment to the right lower extremity. Dr. Taylor noted that Mr. Glausser had protected his right knee over the years and the doctor recommended caution on uneven surfaces or with activities that may cause twisting of the knee. He also advised that he should avoid kneeling for prolonged periods of time on hard surfaces and that he only climb stairs and ladders occasionally. (Cl. Ex. 1) I accept Dr. Taylor's rating as reasonable.

Given the nature of Mr. Glausser's right leg injury, I find the recommended restrictions from Dr. Taylor to be reasonable and accept them as accurate, even though claimant likely exceeded these restrictions prior to 2014. I find that as a result of the 1990 injury, Mr. Glausser sustained the loss of the use of his right leg.

Second alleged qualifying injury

Mr. Glausser sustained a work-related injury to his left lower extremity on December 16, 2014 while in the employment of Tricon Construction. On the date of the injury, Mr. Glausser fell from a ladder and landed awkwardly on his left leg and ankle. He sustained a serious fracture to his left tibia and fibular near his ankle, and a portion of the fractured tibia was protruding through a gash on his lower leg. (JE4, pp. 9-11) He was taken from the work site via ambulance to Finley Hospital in Dubuque and then via helicopter to the University of Iowa Hospitals and Clinics (UIHC). (JE4; Testimony)

Between December 16, 2014 and January 2, 2015, Mr. Glausser underwent five surgeries while at the University of Iowa Hospitals and Clinics (UIHC). He also underwent hyperbaric oxygen treatments. He was discharged on January 13, 2015 and transferred to a skilled nursing and rehabilitation facility at Mercy Hospital in Dubuque; he was there for approximately three weeks. (JE2, pp. 9-10) Mr. Glausser required continued treatment, including two additional surgeries. (JE5)

On February 19, 2016, Mr. Glausser was seen at UIHC by Michael C. Willey, M.D. He reported he was doing quite well but he did have some pain, especially with prolonged walking. He was back to work as a contractor. Dr. Willey released him to full work activity without restriction. He was instructed to follow-up as needed. (JE5, pp. 18-19)

In early March of 2016, Mr. Glausser saw Joseph J. Chen, M.D., at the UIHC for an impairment rating. Dr. Chen noted that Mr. Glausser had a predominantly chronic ankle fracture from a severe open ankle fracture as a result of a work injury in December 2014. He noted markedly limited ankle range of motion. Dr. Chen anticipated that he would have long-term sequelae from the injury and may even need a total ankle replacement. Mr. Glausser was placed at maximum medical improvement.

Dr. Chen stated he required no permanent restrictions. Dr. Chen assigned 22 percent impairment of the left lower extremity pursuant to that AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (JE5, pp. 19-21)

On March 28, 2018, Dr. Chen authored a letter commenting on the impairment rating assigned by Dr. Taylor. Dr. Chen disagreed with Dr. Taylor's assignment of 3 percent impairment of the whole person for disfigurement. Dr. Chen modified his own impairment rating to 29 percent impairment. (JE5, pp. 21-22)

At the request of his attorney, Mr. Glausser saw Mark Taylor, M.D., for an IME on August 11, 2016. Dr. Taylor assigned 29 percent impairment of the left lower extremity due to range of motion and sensory deficits. With regard to restrictions for the left ankle Dr. Taylor recommended that he avoid lifting more than 30 pounds at waist level, or at least at or above knee level. He also noted that he could not easily squat due to the decreased ankle motion. Mr. Glausser's carrying abilities were also limited to fairly short distances. His standing and walking is also limited and he needed to be able to sit when necessary. He required the ability to elevate the leg as needed due to significant swelling that could occur. The doctor also recommended that he not climb ladders and only climb stairs on a rare basis. He needed to avoid uneven surfaces. Additionally, he was limited in the types of vehicles or equipment he could operate. (CL. Ex. A, pp. 9-10) Given the nature of the left leg injury, I find Dr. Taylor's restrictions to be reasonable and accept them as accurate. I find that as a result of the 2014 work injury Mr. Glausser lost the use of at least a portion of his left leg.

Having reached these findings of fact, I must consider the 1990 right leg injury and the 2014 left leg injuries to determine the combined effect of these injuries on claimant's future earning capacity.

At the request of Mr. Glausser's attorney, Kevin L. Schutz, vocational rehabilitation counselor, prepared a vocational evaluation report. (Cl. Ex. 3 & 4) Mr. Schutz evaluated Mr. Glausser on March 20, 2018. Mr. Schutz interviewed Mr. Glausser and also had him take the Wide Range Achievement Test-5 and a Career Assessment Inventory. In his vocational report, Mr. Schutz set forth his understanding of Mr. Glausser's employment history, current restrictions, and transferable experience and knowledge. Mr. Schutz stated, "Mr. Glausser has limited potential to pursue and perform the types of occupations that otherwise represented his pre-injury earning capacity." (Cl. Ex. 3, p. 13. He ultimately opined that Mr. Glausser has experienced a loss of earning capacity in the range of 50 to 55 percent. (Cl. Ex. 3)

On June 30, 2018, Rene Haigh, disability/vocational case manager prepared an initial vocational assessment report based on a records review. Ms. Haigh believes that Mr. Glausser could "obtain and maintain employment in the labor market in occupations classified up to the selectively MEDIUM physical demand level, with or without accommodations utilizing recommendations from Dr. Taylor, and has sustained a small loss of earning capacity." (Def. Ex. DD, p. 24) Based on Dr. Chen's recommendations,

Ms. Haigh opined that Mr. Glausser has not sustained any loss of access to any employment opportunities or a loss of earning capacity. (Def. Ex. DD)

I find the opinions of Mr. Schutz to be more persuasive than those of Ms. Haigh. Unfortunately, Ms. Haigh did not have the opportunity to meet, interview, test, or observe Mr. Glausser. Mr. Schutz had the advantage of meeting with and testing Mr. Glausser. After having observed Mr. Glausser at the hearing and reviewing the medical documentation, I do not find Ms. Haigh's opinions to be reasonable or persuasive. Thus, I give greater weight to the opinions of Mr. Schutz.

In this case, claimant is of an age where he can retrain and pursue other employment options if he so chooses. Mr. Glausser has demonstrated good motivation in continuing his employment. He has found ways to modify or adjust the way in which he performs his job duties. Mr. Glausser credibly testified that he believes he may be in better condition if they would have amputated his leg; this is an option he is still considering. He has lost much of the function or motion in the left ankle; he cannot move the ankle up and down or side to side. He feels like his lower leg and foot are just there. He feels he cannot climb ladders, get onto trusses. He cannot get down on his hands and knees because it is hard for him to get back up off the ground. He also cannot lay on the ground any more. He cannot spend an entire day on his feet or walking. If it is a busy day, he needs to sit down by noon. When his foot swells, he needs to be able to elevate it. It is difficult for him to check other people's work during critical phases of projects. He has had to hire someone else to walk the building for him. He has had to sit in a lawn chair in the middle of the building and have people come to him to ask questions. He simply cannot carry the same amount of weight as he was previously able to carry. While he is grateful to be in his same superintendent position with Tricon, he recognizes that he does not have the same ability to improve his position as he did prior to his injuries.

Mr. Glausser has sustained a significant injury to his left leg. The effects of that injury, combined with his prior right leg injury produce a moderate impact on his ability to perform the labor intensive work and have the same earning potential as he previously had. Mr. Glausser has proven he sustained a loss of earning capacity as a result of the combined effects of these injuries. Considering his age, educational background, employment history, ability to retrain, motivation to maintain employment, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has proven a 45 percent loss of future earning capacity as a result of the combined effects of the 1990 right leg and 2014 left leg injuries.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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).

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); 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).

Administrative notice was taken of the Agreement for Settlement (AFS) between the claimant and defendant-employer and defendant-insurance carrier which was approved by this agency on August 2, 2018. In the AFS, the defendants agreed to pay claimant 29 percent permanent impairment of the left leg. The Fund is not bound by

settlements between the claimant and employer. See Grahovic v. Second Injury Fund, File No. 5021995 (App. October 9, 2009).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. 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.

Based on the above findings of fact, I conclude Mr. Glausser has sustained a 45 percent loss of future earning capacity as a result of the combined effects of the 1990 right leg and 2014 left leg injuries. Thus, Mr. Glausser has demonstrated by a preponderance of the evidence that he is entitled to 250 weeks of permanent partial disability benefits. Fund benefits begin at the expiration of the employer's obligation which is the date the employer's payment of any permanent partial disability benefits conclude. The employer paid 63.8 weeks of permanent partial disability benefits for the left lower extremity commencing on January 6, 2016. Thus, the permanency benefits owed by the Fund shall commence on March 28, 2017.

The Fund is entitled to a credit against any award of benefits. The Fund is responsible only for the industrial disability that exceeds the scheduled disability attributable to the first and second injuries. Iowa Code section 85.64. The Fund is entitled to a credit for the impairment assigned for each scheduled injury. In the present case, Mr. Glausser sustained 9 percent right lower extremity impairment which amounts to 19.8 weeks. For the left lower extremity, Mr. Glausser sustained 29 percent left lower extremity impairment, which amounts to 63.8 weeks. Thus, the Fund is entitled to a credit of 101.2 weeks. The Fund shall pay 123.8 weeks of permanent partial disability benefits at the stipulated rate.

Claimant is seeking an assessment of costs. However, the Second Injury Fund Act does not provide for costs to be paid from the Fund. Iowa Code section 85.66 prohibits expenditures from the Fund for other purposes. See Houseman v. Second

Injury Fund, File No. 5052139 (Arb. August 8, 2016). Therefore, claimant's request for costs is denied.

ORDER

THEREFORE, IT IS ORDERED:


All weekly benefits shall be paid at the stipulated rate of six hundred forty-nine and 63/100 dollars (\$649.63).

The Fund shall pay one hundred twenty-three point eight (123.8) weeks of permanent partial disability benefits commencing on March 28, 2017.

Interest accrues on unpaid Fund benefits from the date of this decision.

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 23rd day of October, 2018.


ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Christopher Fry
Attorney at Law
1000 Main St.
Dubuque, IA 52001
cfry@octhomaslaw.com

Amanda R. Rutherford
Assistant Attorney General
Dept. Justice
Hoover State Office Bldg.
Des Moines, IA 50319
Amanda.rutherford@ag.iowa.gov

EQP/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.