BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DENNIS BLOCK,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

File No. 5044550

APPEAL DECISION

Head Note No.: 3200

Defendant Second Injury Fund of Iowa (hereinafter SIF) appeals from an arbitration decision filed on August 18, 2014. Claimant cross-appealed, but the only issues raised in claimant's appeal brief were the same issues raised by SIF. Therefore the cross-appeal is moot.

The case was heard on June 2, 2014, and it was considered fully submitted on August 1, 2014, in front of the deputy workers' compensation commissioner.

Due to stipulations at hearing, the employer, North Iowa Sand & Gravel, Inc. and its insurer, Midwest Family Mutual Ins. Co., were not interested parties at the arbitration hearing and are not interested parties in this appeal. North Iowa Sand & Gravel, Inc. and Midwest Family Mutual Ins. Co. are dropped as party defendants in this proceeding. SIF is the only remaining defendant in this proceeding.

At hearing, the parties stipulated that on July 5, 2011, claimant sustained an injury to his right lower extremity. In the arbitration decision filed on August 18, 2014, the deputy commissioner determined claimant did sustain a prior qualifying loss to his left lower extremity in 1972 which entitles claimant to SIF benefits. The deputy commissioner determined claimant sustained permanent total disability as a result of the combination of the two injuries.

SIF asserts on appeal that the deputy commissioner erred in determining claimant sustained a prior qualifying loss. SIF also asserts that the deputy commissioner erred in determining claimant is permanently and totally disabled. Claimant asserts that the decision of the deputy commissioner should be affirmed.

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal.

Claimant's exhibits were marked numerically. Defendant's exhibits were marked alphabetically with double letters.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

ISSUES ON APPEAL

I. Whether claimant has a prior loss which qualifies him for SIF benefits pursuant to Iowa Code section 85.64 and, if so:

II. The extent of claimant's entitlement to industrial disability benefits from SIF.

STIPULATIONS AT HEARING

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On July 5, 2011, claimant suffered a work injury causing a 7 percent loss of use to the right lower extremity entitling him to 15.4 weeks of permanent partial disability benefits from the employer.

2. At the time of the July 5, 2011, injury, claimant's gross weekly earnings were $583.00. Also at that time, claimant was single and entitled to one exemption for income tax purposes. Therefore, claimant's weekly workers' compensation benefit rate is $371.67 according to the workers' compensation commissioner's published rate book for this injury.

3. Prior to hearing, the employer voluntarily paid 15.4 weeks of permanent disability benefits at the stipulated weekly rate for claimant's work injury.

FINDINGS OF FACT

Claimant was 65 years old at the time of the hearing. He is a high school graduate. He took one year of courses at Hamilton Business College many years ago studying accounting. He had good grades, but left school to engage in truck driving. (Tr. p. 42) Claimant states he has no computer skills, but did receive some basic computer training at the local unemployment office. (Ex. 13, p. 2)

Prior to his stipulated work injury to the right lower extremity on July 5, 2011, claimant had been a truck driver for several employers since 1972, except for a ten-year period when he used his own money to invest in stock upon the advice of brokers and only drove a truck a few times to help out friends. (Tr. pp. 35-36; Ex. 13, p.2) Claimant asserts his stock investments were unsuccessful, but admitted he got by financially during this ten-year period. (Tr. p. 43) Claimant also sold insurance in 1987. Although this job was for only one month according to claimant, he admits he was successful at

this job and only left it because "it was a rat race" and he could make more money driving a truck. (Tr. pp. 37, 44-45)

On July 5, 2011, claimant was working as a dump truck driver for the employer herein when he suffered the stipulated work injury. He caught his right foot on a broken step and fell. The twisting injury and fall resulted in a torn quadriceps tendon and a meniscus tear of the right knee. (Ex. 3, p. 19) After surgery on the right knee and quad tendon, claimant had physical therapy.

Based on the results of a valid functional capacity evaluation (FCE), which were adopted as claimant's permanent restrictions by the treating physician, Alexander Pruitt, M.D. (Ex. 4, p.31), claimant cannot physically perform the heavy category of work required of dump truck drivers, which includes essential duties of the job such as reaching above shoulder level, occasional climbing of a step in excess of 15 inches in height with the right lower extremity; two-hand floor-to-waist lifting and carrying greater than 30 pounds, and two-hand push-pull greater than 32 pounds of force. (Ex. 5, pp. 32-34) Dr. Pruitt opined that claimant suffered a permanent seven percent impairment of the right lower extremity from the work injury. (Ex. 4, p. 30) Claimant's IME physician, John Kuhnlein, D.O., agreed with Dr. Pruitt's rating and the permanent restrictions found in the FCE. (Ex. 6, p. 46)

It should be noted that the FCE evaluator found impairment in the left lower extremity when testing revealed an inability to perform occasional climb of 17-inch step height using the left lower extremity. The FCE also found claimant physically able to function at the light-medium category of work due to the ability to lift and carry 30 pounds with one or two hands from floor to waist level. (Id.) The FCE evaluator stated that claimant is employable with his limitations. (id.) Dr. Kuhnlein stated as follows:

> The prognosis for complete symptom resolution appears to be poor. The prognosis for unrestricted return to work appears to be fair at best. The prognosis for return to work with appropriate accommodations should actually be excellent.

(Ex. 6, p. 45)

Claimant asserts that in 1972 he was injured in a car accident and fractured his left leg or knee and the left meniscus was surgically removed. He stated that since that time, the use of the left knee has been troublesome. He has had to compensate with his right knee such as only leading with his right leg in climbing in and out of his truck. He also had trouble shifting certain trucks when the clutch was hard to push down. (Tr. pp 26-27)

As previously stated, claimant was evaluated by Dr. Kuhnlein in September 2013. In his report dated October 30, 2013, Dr. Kuhnlein opined that prior to the right knee work injury claimant had 33 percent impairment of the left lower extremity for his left knee. That impairment rating consisted of two percent for the medial meniscectomy;

20 percent for arthritic changes in the medial compartment; and 15 percent for patellofemoral arthritic changes. (Ex. 6, p. 46) Claimant admitted he did not seek any further treatment for his left knee after recovering from the 1972 surgery. (Tr. p. 47) Claimant admitted he had no permanent restrictions from the 1972 injury and he admitted he resumed heavy manual labor. (Tr. pp. 47-49) Claimant testified he could not obtain any medical records for the left knee surgery from the hospital in Waterloo because a flood destroyed those records. (Tr. p. 46)

Claimant was terminated by the management of North Iowa Sand & Gravel, Inc. because they could not accommodate his permanent restrictions for the right lower extremity injury. Claimant has not worked in any capacity following his July 5, 2011, injury. Claimant has applied to other employers seeking employment and submitted a list of these applications from May 2013 through August 2013. (Ex. 11, p. 64-65) Claimant received unemployment benefits from May 2013 through November 2013. He stated he continued to submit the required two applications per week until his unemployment benefits ended. (Tr. p. 72) He admitted he has not made any formal employment applications since November 2013. (Tr. p. 73) Claimant has been receiving social security retirement benefits since June 2011, a month before his work injury, but he stated that he planned to continue working. (Tr. pp. 34, 66)

Claimant underwent a vocational evaluation with Phil Davis, M.S. Davis opined claimant is precluded from 100 percent of all of his past employment activities. Davis did not opine that claimant was unemployable or precluded from competitive employment in the labor market. Although Davis mentions claimant's stock investment activity for ten years in his report, he did not mention claimant's experience selling insurance. Davis did not discuss claimant's ability to return to light-medium driving positions, sales positions, or light-medium factory work, or light/medium administrative jobs. Davis did not opine that claimant is unable to be retrained.

I find that the combined impact of the prior loss of use of claimant's left lower extremity due to the prior meniscectomy and the significant arthritis found by Dr. Kuhnlein, along with the work injury of July 5, 2011, is a cause of a 65 percent permanent loss of earning capacity. Although it has been shown that claimant cannot return to any of the physically demanding truck driving jobs he has held in the past, it has not been shown that lighter driving jobs or other suitable light-medium positions are not available to him. Given claimant's educational record at the business college and the change of work from trucking to stock investment activity and another change to become a licensed insurance salesperson, I find claimant is retainable and he has not shown an inability to return to similar activity. His employment search is too limited to show he is unemployable.

On the other hand, claimant clearly cannot return to heavy work as a truck driver, the occupation for which he is best suited given his past work experience. Although he is still employable, he would have to begin suitable jobs at entry level of pay, which would be substantially less than his earnings as a dump truck driver.

Both Dr. Pruitt and Dr. Kuhnlein agree that April 3, 2013, is the date claimant reached maximum medical improvement for the July 5, 2011, injury.

CONCLUSIONS OF LAW

Claimant seeks additional disability benefits from SIF under Iowa Code sections 85.63--85.69. The Second Injury Fund was created to compensate an injured worker for a permanent industrial disability resulting from the combined effect of two separate injuries to a scheduled member. The purpose of such a scheme of compensation was to encourage employers to hire or retain handicapped workers. Anderson v Second Injury Fund, 262 N.W. 2d 789 (Iowa 1978). There are three requirements under the statute to invoke Second Injury Fund liability. First, there must be a permanent loss or loss of use of one hand, arm, foot, leg or eye. Secondly, there must be a permanent loss or loss of use of another such member or organ through a compensable subsequent injury. Third, there must be permanent industrial disability to the body as a whole arising from both the first and second injuries which is greater in terms of relative weeks of compensation than the sum of the scheduled allowances for those injuries. If there is greater industrial disability due to the combined effects of the prior loss and the secondary loss than equals the value of the prior and secondary losses combined, then the fund will be charged with the difference. Id.

The Iowa Supreme Court has ruled that to invoke Second Injury Fund liability, both the first and second injuries must be scheduled member injuries. Second Injury Fund v. Nelson, 544 N.W. 2d 258 (Iowa 1995). Scheduled member injuries are those parts of the body specifically listed in Iowa Code section 85.34(2)(a-t). Unscheduled injuries are those not specifically listed and are covered by Iowa Code section 85.34(2)(u). See generally, Martin v. Skelly Oil Co., 252 Iowa 128, 133 106 N.W. 2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W. 2d 116 (Iowa 1983); Simbro v Delong's Sportswear, 332 N.W. 2d 886, 997 (Iowa 1983).

First Qualifying Loss of Use:

SIF argues that the first requirement is not met in this case in that although there may be functional loss, the first injury must tend to act as a hindrance to the individual's ability to obtain or retain effective employment. In support of this proposition, SIF cites Anderson, 262 N.W. 2d at page 791 which contains that language. In further support of its position, SIF cites two unpublished decisions of the Court of Appeals and an appeal decision from this agency in April 2015 which state that a failure to produce medical records, and failure to show any permanent restrictions on work activity, and a failure to complain about any continuing problems to doctors prior to the second injury fails to show a qualifying injury. SIF also asserts a lack of evidence of an adverse impact on earning capacity and no objective evidence of disability caused by the prior injury, despite an impairment rating by a doctor issued after the second injury. Bolton v. Second Injury Fund of Iowa, 855 N.W .2d 202 (Iowa Ct. App. 2014); Melson v. City Carton Recycling & Second Injury Fund of Iowa, Iowa Ct of Apls Dec No. 7-587/06-1217, Filed November 29, 2007; Hoeksema v. Second Injury Fund of Iowa, File No.

5036534, (App. October 13, 2014). In Bolton, the Court affirmed this agency's rejection of a one percent rating by Dr. Kuhnlein because it was based only on claimant's subjective pain complaints which were not made to examining physicians before the second injury. SIF states that claimant failed to report his prior knee problems to the therapist who performed the FCE.

Claimant counters by citing a published Supreme Court decision that rejected the defendant's claim that the first injury must have an industrial impact prior to the second injury. Industrial loss after a second scheduled member injury is determined from the cumulative effect of both injuries, not the industrial loss from each injury in isolation. Second Injury Fund v. Braden, 459 N.W. 2d 467, 469 (Iowa 1990). An absence of medical records does not defeat a claim against the Second Injury Fund. Second Injury Fund of Iowa v. George, 737 N.W.2d 141 (Iowa 2007)

With reference to SIF's reliance on Anderson, the language referred to by the defendant in that decision came from a treatise about Tennessee law. The Court's purpose was to demonstrate the background and purpose of Second Injury Fund laws in general. It was not meant to suggest that the terms "loss of use" as used in the first sentence of Iowa Code section 85.64 meant more than just functional loss. Clearly, the Court in Nelson and Braden reiterated that the qualifying prior injury must only be a scheduled loss. In determining a scheduled loss, only functional loss of use, not its impact on a person's work, is examined. Simbro v. Delong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983).

Also, the facts in this case are clearly distinguishable from the Court of Appeals and agency cases cited by defendant. Claimant's testimony concerning his continuing problems doing certain work tasks is uncontroverted and the deputy found him credible. Also, claimant reported his prior medical history of meniscus surgery to both treating orthopedists for the right knee during their initial examinations. (Ex. 2, p. 4; Ex 4, p. 20) There is no medical evidence that claimant withheld that history from any physician prior to the second injury. Despite the fact that the FCE report does not mention a prior left knee injury, the evaluator found a climbing impairment in the left leg and also found claimant's evaluation and effort valid. (Ex. 5, p. 33) Finally, Dr. Kuhnlein is not basing his views solely on claimant's subjective complaints. Dr. Kuhnlein's examination of the left knee revealed a scar consistent with a meniscus surgery. The doctor also found significant arthritis in the left knee compartment and the patellofemoral region of the left knee from analyzing x-rays of the knee. Consequently, there is objective evidence of prior impairment. The surgery alone qualifies for a permanent impairment rating under the AMA Guides as cited by Dr. Kuhnlein. (AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, pp. 544-546) SIF suggests in its appeal brief that we should ignore the arthritis finding because there is no expert opinion that it was caused by the meniscus injury. A prior qualifying injury does not require an actual injury, only a prior loss of use. A condition such as arthritis which develops over a period of years can itself constitute a prior permanent impairment or loss of use qualifying claimant for Second Injury Fund benefits. (Iowa Code section 85.64) The first qualifying injury need not be traumatic. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 816 (Iowa

1994). Finally, claimant gave a reasonable explanation why he was not able to get his prior records from the hospital.

Therefore, I conclude claimant has shown a prior qualifying loss of use, which is supported by the uncontroverted opinion of Dr. Kuhnlein, that before claimant's work injury of July 5, 2011, claimant had a prior permanent scheduled member loss of use consisting of 33 percent to the left leg.

Industrial Loss from the Combined Injuries:

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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally, the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); 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).

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W.2d 258 (Iowa 1995).

An award of interest against the Fund pursuant to Iowa Code section 85.30 is appropriate from the date of the decision. Second Injury Fund v. Braden, 459 N.W.2d 467, 473 (Iowa 1990).

In this case, I find claimant has suffered a 65 percent loss of his earning capacity as a result of the combined impact of the left lower extremity injury in 1972 and the work injury in July 2011. Such a finding entitles claimant to 325 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 65 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

The parties stipulated that claimant suffered a seven percent permanent impairment of the right lower extremity from the work injury, which entitles claimant to 15.4 weeks of permanent partial disability benefits.

I also find that the first injury in 1972 to claimant's left lower extremity resulted in a 33 percent impairment of the left lower extremity. Based on this finding, claimant would be entitled to scheduled member benefits consisting of a total of 72.6 weeks of permanent partial disability under Iowa Code section 85.34(2)(o) which is 33 percent of 220 weeks, the maximum allowable weeks of disability for an injury to the lower extremity in that subsection.

Clearly, claimant's industrial disability far exceeds the combined scheduled member disabilities in this case. Defendant is liable for the remaining amount of disability after deducting the compensable value of the first and second injuries. Therefore, claimant shall be awarded 237 weeks of permanent partial disability benefits, which is the number of weeks for the industrial loss of 325 weeks minus the combined value of the first and second injuries, or 88 weeks. The weekly benefits from SIF shall commence 88 weeks after April 3, 2013, which is the date the healing period ended for the work injury of July 5, 2011. Therefore, the commencement date for SIF benefits is March 13, 2015.

ORDER

IT IS THEREFORE ORDERED: The arbitration decision of August 18, 2014, is modified and the following is ordered:

1. The Second Injury Fund of Iowa shall pay to claimant 237 weeks of PPD benefits at the stipulated weekly benefit rate of three hundred seventy one and 67/100 ($371.67) commencing on March 13, 2015.

2. The Second Injury Fund of Iowa shall pay interest on weekly benefits from the date of this decision pursuant to Iowa Code section 85.30.

3. The Second Injury Fund of Iowa shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33.

Signed and filed this 16th day of September, 2015.

Joseph S. Cortese II

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