

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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HEATHER HOUSLEY,	:		<b>FILED</b>
	:	File No. 5052507	<b>MAR 20 2019</b>
Claimant,	:		<b>WORKERS' COMPENSATION</b>
	:	A P P E A L	
vs.	:		
	:	D E C I S I O N	
SECOND INJURY FUND OF IOWA,	:		
	:	Head Note: 3202	
Defendant.	:		

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Claimant Heather Housley appeals from an arbitration decision filed on October 30, 2017. Defendant Second Injury Fund of Iowa (the Fund) responds to the appeal. The case was heard on November 17, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 19, 2016.

The deputy commissioner found claimant failed to carry her burden of proof that she is entitled to receive benefits from the Fund because claimant failed to establish her employer's liability for permanent disability resulting from the alleged work-related right upper extremity injury which occurred on November 27, 2006, because claimant failed to produce evidence of a prior agreement for settlement or an adjudication of that claim, and because claimant also failed to include the employer in that claim as a necessary party in this litigation. The deputy commissioner found that because claimant failed to prove entitlement to receive benefits from the Fund, all other issues raised in this matter are moot. The deputy commissioner ordered the parties to pay their own costs of the arbitration proceeding.

On appeal, claimant asserts the deputy commissioner erred in finding claimant failed to prove entitlement to receive benefits from the Fund by failing to produce evidence of a prior agreement for settlement or an adjudication of the November 27, 2006, injury claim, or by failing to include the employer in that claim as a party in this litigation. Claimant asserts the employer's liability in the November 27, 2006, claim is established by voluntary weekly payments made by the employer and its insurer. Claimant asserts the deputy commissioner erred in finding all other issues raised in this matter are moot.

Defendant Fund asserts on appeal that the arbitration decision should be affirmed in its entirety.

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

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties and I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on October 30, 2017, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided a well-reasoned analysis of all of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

I affirm the deputy commissioner's finding that claimant failed to prove she is entitled to receive benefits from the Fund because claimant failed to establish her employer's liability for permanent disability resulting from the alleged work-related right upper extremity injury which occurred on November 27, 2006, because claimant failed to produce evidence of a prior agreement for settlement or an adjudication of that claim, and because claimant also failed to include the employer in that claim as a necessary party in this litigation. I affirm the deputy commissioner's finding that the employer's liability in the November 27, 2006, claim is not established by voluntary weekly payments made by the employer and its insurer. I affirm the deputy commissioner's finding that because claimant failed to prove entitlement to receive benefits from the Fund, all other issues raised in this matter are moot. I provide the following analysis for my decision in this matter:

The threshold issue in this matter is whether Second Injury Fund benefits are triggered.

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Iowa Code section 67.64 (2016). Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467, 469 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 355, 356 (Iowa 1989); Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300, 301 (Iowa 1979).

Iowa Code section 85.64, provides the means for injured workers to obtain the disability benefits that exceed the amount attributed to the first and second injury. Section 85.64 states the following, in pertinent part:

*In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ. (emphasis added)*

This language represents the central fighting issue in this case.

The Fund argues that Fund benefits are not triggered in this case because the employer's obligation has not been established in the November 27, 2006, injury claim. The Fund argues that without a settlement or adjudication between the claimant and the employer in that claim, the employer's obligation cannot be established. The Fund cites Second Injury Fund of Iowa v. Braden, for the proposition that "[u]nlike ordinary workers' compensation benefits . . . the Second Injury Fund's obligation cannot be assessed until the employer's liability is fixed." 459 N.W.2d 467, 476 (Iowa 1990)(citing Iowa Code Section 85.64) The Fund also points to Eaton v. Second Injury Fund of Iowa, 723 N.W.2d 452, 2006 WL 2560854 at 4 (Iowa Ct. App. 2006), which is an unpublished decision, yet nevertheless provides guidance. The Court of Appeals in Eaton stated,

We agree with the district court that it was the legislature's manifest intent in passing this statute to require the establishment of the employer's liability before allowing recovery from the Fund . . . Accordingly, we agree with the commissioner and the district court that where, as here, there has been no prior adjudication or settlement establishing the employer's liability the employer is a necessary party to the employee's action against the Fund . . .

(Id.)

In this case, the employer was not a party to these proceedings, there was no settlement agreement between the claimant and the employer, and there was no prior adjudication establishing the employer's liability.

The Fund argues that based on section 85.64 and Eaton, the establishment of the employer's obligation through adjudication or settlement is a condition precedent to triggering Fund benefits, and without such, the employer is a necessary party in this action. Having excluded all of these things from this proceeding, I affirm the deputy commissioner's finding that claimant's action against the Fund must fail.

Claimant argues that nowhere in the statutory language is there a stated requirement that there be a final adjudication either by an agreement for settlement or by agency decision of the employer's liability. Claimant argues that the credit to be given the Fund for the employer's portion of scheduled member liability can be determined without the employer's presence in this proceeding. Further, claimant argues that the same can be shown from the documents submitted confirming voluntary payment of weekly benefits to claimant. Claimant further argues that the Fund admits claimant was paid five weeks of permanent partial disability benefits prior to the arbitration hearing. However, I affirm the deputy commissioner's finding that the Fund merely admitted claimant was paid five weeks of permanency benefits, which is not the same thing as stipulating to the employer's extent of liability. Iowa Code section 86.13(1) states the following, in pertinent part:

If an employer or insurance carrier pays weekly compensation benefits to an employee . . . The payments establish conclusively that the employer and insurance carrier have notice of the injury for which benefits are claimed but the payments do not constitute an admission of liability under this chapter or chapter 85, 85A or 85B.

Because those voluntary payments are nothing more than that, I find those payments cannot be used in this matter to establish the employer's liability in the November 27, 2006, injury claim.

However, claimant presents a well-reasoned argument that this agency allows the Fund to re-litigate the employers' liability even after an approved agreement for settlement or agency adjudication against the employer in which the Fund did not participate, because such a settlement or adjudication is not binding on the Fund. Grahovic v. Second Injury Fund of Iowa, File No. 5021995 (App. October 9, 2009). Consequently, claimant argues that if such an agreement for settlement has no preclusive effect on the Fund, and the employer's liability can be re-determined without the presence of the employer, then the employer's presence in this case should not be necessary.

However, in reviewing Eaton and Braden, the issues and arguments in Eaton are quite similar to those presented in this case. The court dealt with the same provision in Iowa Code section 85.64 and the issue of whether an employer is an indispensable party to a Fund claim in the absence of an approved agreement for settlement. In that case, the court agreed that the extent of the employer's liability must be fixed or established before an award can be made against the Fund. The court noted the employer was in the best position to defend a liability claim against it.

The agency appeal decision sustained by the Court of Appeals in Eaton is the binding precedent in this case. There is no other more recent agency precedent on this issue. Although it might be argued that this agency precedent is no longer valid given the more recent decision in Grahovic, I find this is not the case and I affirm the deputy commissioner's finding that pursuant to Eaton, claimant's petition against the Fund must be dismissed.

Claimant further argues that the Fund's answer does not allege as a defense that claimant's petition is defective and that the Fund has therefore waived this argument. However, I affirm the deputy commissioner's finding that it is the responsibility of the claimant in a claim against the Fund to show the compensability of the work injury and the liability of the Fund in excess of the liability of the employer and I therefore affirm the deputy commissioner in rejecting this argument.

Therefore, I affirm the deputy commissioner's finding that claimant failed to carry her burden of proof that Fund benefits are triggered in this matter because claimant failed to produce a prior agreement for settlement or adjudication concerning the claimant and the employer and, in the absence thereof, claimant also failed to include

the employer as a necessary party in this litigation. As a result of this finding, all remaining issues raised by claimant in this case are moot.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I affirm the deputy commissioner's finding that each party shall pay their own costs of the arbitration proceeding. Claimant shall pay the costs of the appeal.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on October 30, 2017, is affirmed in its entirety.

Claimant shall take nothing in these proceedings.

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed on this 20<sup>th</sup> day of March, 2019.

*Joseph S. Cortese II*

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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

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