

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SUSAN ARTHUR,

Claimant,

vs.

SUTHERLAND PRINTING,

Employer,

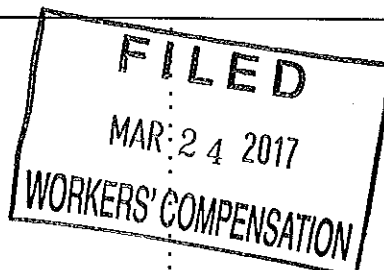
and

TWIN CITY FIRE INSURANCE
COMPANY,

Insurance Carrier,

SECOND INJURY FUND OF IOWA,

Defendants.



File No. 5051508

ARBITRATION

DECISION

Head Note No. 1803

STATEMENT OF THE CASE

Claimant filed a petition for arbitration seeking workers' compensation benefits from Sutherland Printing, as the employer and Twin City Fire Insurance Company, their insurance carrier. She also filed a claim against the Second Injury Fund of Iowa.

The matter came on for hearing on February 25, 2016, before deputy workers' compensation commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 8; defense exhibits A through D; Fund Exhibits AA through BB, as well the sworn testimony of claimant, Susan Arthur. The parties briefed this case and the matter was fully submitted on April 1, 2016.

ISSUES

1. The nature and extent of any permanent partial disability. The claimant alleges that her disability is industrial. This is disputed by the employer. Alternatively, if the disability is scheduled, the claimant alleges the Second Injury Fund is responsible for industrial disability benefits. The Fund disputes this.

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.

Through the hearing report, the parties stipulated to the following. These stipulations are accepted.

1. The claimant suffered an injury which arose out of and in the course of employment on November 3, 2011, which caused both temporary and permanent disability.
2. The claimant made no claim for temporary disability or medical benefits.
3. The elements which comprise the claimant's rate of compensation are all stipulated. The parties contend the appropriate weekly rate of compensation is \$487.91 per week.
4. The commencement date for permanent partial disability benefits is April 1, 2014.
5. The employer is entitled to a credit of 30 weeks of compensation.

FINDINGS OF FACT

Claimant, Sue Arthur, was 55 years old at the time of hearing. She is left-handed. She graduated from high school in Williamsburg, Iowa and now lives in Searsboro, Iowa, a town of 149 people. Ms. Arthur worked for Sutherland Printing in Montezuma, Iowa for 30 years from 1984 to 2014. For all practical purposes, this has been her only relevant employment. Ms. Arthur has completed some college coursework, both at Kirkwood Community College and Iowa Wesleyan College, however, she does not have a college degree.

Ms. Arthur testified at hearing. She presented as a highly credible witness. Her testimony was consistent with the medical file and the exhibits in the record. There was nothing about her demeanor which caused the undersigned any concern. I find her testimony credible.

At Sutherland Printing, Ms. Arthur ran various printing machines including "a folder, collator, perfect binder and shrink wrap machine." (Claimant's Exhibit 8, page 83) She worked 40 to 60 hours per week and earned \$18.25 per hour, at her highest rate of pay.

Although generally healthy prior to her work injury, Ms. Arthur did have a disability in her right knee prior to her work injury. While it was work-related, she did not report it and she sought treatment on her own. In 2007, she was hurrying across a

room at work and tripped on some wires. She injured her right knee. She testified she has had continuous symptoms in her knee since that date. There is minimal supporting documentation in the record.

Ms. Arthur developed pain in her bilateral hands and wrists in 2011. The employer conceded this qualified as a work injury and accepted the insurance claim. The date of manifestation was deemed to be November 3, 2011. The symptoms came on gradually. The employer authorized Melissa Young Szalay, M.D., to provide her treatment. Dr. Young is an orthopedic surgeon at Des Moines Orthopaedic Surgeons, P.C. Dr. Young began treating Ms. Arthur on December 21, 2011. At that visit she documented the following.

The patient complains of a five-year history of paresthesias in both hands. Symptoms of paresthesias have waxed and waned over time. Currently she mostly gets paresthesias in 'the whole hands' nocturnally. These symptoms wake her from sleep. She does not note any change in dexterity. She is dropping things but states that they are heavier things, not things that involve finer dexterity. Her more significant complaint is of a six-month history of bilateral thumb base pain. The thumb base pain has been progressive and is now severe. She rates her pain at 9/10 and describes it as an ache with occasional sharp pain. The right and left are equal in terms of pain.

(Cl. Ex. 3, p. 6)

After performing electrodiagnostic imaging studies, Dr. Young diagnosed bilateral carpal tunnel syndrome and CMC arthritis. (Cl. Ex. 3, p. 7) She attempted some conservative treatment initially, but later performed surgeries. She first performed an arthroplasty and carpal tunnel release on the right on March 5, 2012. She eventually had surgery on the left side (carpal tunnel release only) on September 26, 2013. (Cl. Ex. 3, p. 24) She opined that Ms. Arthur reached maximum medical improvement on March 26, 2014. (Cl. Ex. 3, p. 27)

Dr. Young assigned impairment ratings of 5 percent to each upper extremity, as well as permanent work restrictions of no forceful or repetitive grasping. (Cl. Ex. 3, p. 30) A functional capacity evaluation (FCE) was also ordered and performed which placed the claimant in the light-medium work. This occurred in March 2013, before the left carpal tunnel surgery. (Cl. Ex. 4) She restricted claimant from all forceful pinching or grasping activities. (Cl. Ex. 3, p. 31) This is a significant restriction which the employer was unable to accommodate. The claimant's job officially ended due to her disability on April 30, 2014.

Irving Wolfe, D.O., performed an independent medical evaluation on September 26, 2014. (Cl. Ex. 5) He performed a thorough record review and evaluation. I find his report compelling. He provided expert medical opinions regarding the functional

disability and restrictions in claimant's bilateral hands/arms and her right knee. He opined she had sustained a 3 percent whole body loss of function of her right leg resulting from her knee injury. (Cl. Ex. 5, p. 64) It appears this is based primarily upon subjective pain. It does, however, appear to be an appropriate rating in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He also rated each arm. He further provided impairment rates to both arms and combined them for a 20 percent whole body rating. He explained his ratings in great detail and these ratings appear to be correct under the Guides. (Cl. Ex. 5, pp. 65-67) This rating is more consistent with the claimant's ongoing symptoms and complaints. He also recommended more significant permanent restrictions of no lifting or carrying greater than 15-20 pounds, no repetitive forceful grasping or pinching with either hand and no vibration activities. (Cl. Ex. 5, pp. 65-67)

In addition to the foregoing, there are expert vocational reports in the file as well. Claimant retained Phil Davis, M.S., who opined that claimant has suffered a 100 percent loss of access to the labor market as a result of her work injury. (Cl. Ex. 7, pp. 80-81) The employer retained Michelle Holtz, B.A., who also provided expert vocational analysis. She had a much more hopeful picture of claimant's employment opportunities. She found that while Ms. Arthur had lost her ability to work as a printer, "she retains the ability to secure employment in certain entry-level, unskilled and semi-skilled positions in her labor market area." (Def. Ex. A, p. 16) She identified a number of those jobs in her report. She openly conceded, however, that the claimant, if she did re-enter the workforce, would suffer a significant wage loss. (Def. Ex. A, p. 18) I find the vocational opinions of Ms. Holtz to be credible and accurate.

Ms. Arthur applied for and was awarded long-term disability benefits through UNUM. (Def. Ex. C, p. 49) She has applied for but was denied Social Security Disability benefits. (Def. Ex. D)

At the time of hearing, claimant had significant functional losses in her bilateral hands and arms. These interfere with both her activities of daily living and her ability to work in the competitive job market.

CONCLUSIONS OF LAW

The first question is the nature and extent of the disability in claimant's bilateral hands and arms.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the

functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Since the location of the disability is her bilateral hands and arms, the compensation is dictated by Iowa Code section 85.34(2)(s) (2015). Under section 85.34(2)(s), a claimant is only entitled to loss for functional disability unless the claimant is permanently and totally disabled as a result of the work injury.

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).

I find that the claimant is not permanently and totally disabled as a result of her work injury. I agree with the report of Ms. Holtze, who found that while claimant has a significant industrial disability, she is qualified for a number of entry level positions in the competitive workforce. Thus, her disability is evaluated functionally.

By a preponderance of evidence, I adopt the rating of Dr. Wolfe as the best reflection of claimant's functional losses in her bilateral arms, hands and thumbs. (Cl. Ex. 5, pp. 65-67) Dr. Wolfe's opinion is most consistent with the claimant's ongoing complaints of pain and symptoms of disability found in the record. I find the claimant has suffered a permanent functional loss of 20 percent of her body as a whole. Twenty percent of 500 weeks is 100 weeks. I conclude that the claimant is entitled to 100 weeks of benefits for the permanent functional disability in her bilateral hands and arms under Iowa Code section 85.34(2)(s).

The next issue is whether the claimant has proven a first qualifying injury and disability such that Second Injury Fund liability is triggered.

The first unnumbered paragraph of section 85.64 states:

If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there

had been no preexisting disability. 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.

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 workers with disabilities by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the individual as if the individual had had no preexisting disability. Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978).

The Fund is responsible only 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 1979).

Prior to the manifestation of the bilateral hands and arms condition, claimant had a pre-existing functional disability to her right leg. Ms. Arthur suffered a specific injury to her knee in 2006. This is based upon her testimony, as well as the medical opinion of Dr. Wolfe. While this is a close case because of the lack of supporting documentation, the greater weight of evidence supports this finding. By a preponderance of evidence, I find claimant's right knee condition qualifies as a first disability under the Second Injury Fund. The Fund's credit for this first injury is 5 percent of 220 weeks or 11 weeks.

The next issue is the extent of industrial disability and final findings of Second Injury Fund liability. Since I have previously found that there is Second Injury Fund liability, based upon a first right knee injury from 2006, and a second bilateral hands/arms injury, I must perform an analysis of the claimant's industrial disability. The claimant must prove that her industrial disability exceeds the combination of the scheduled disabilities.

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.

Considering all of the appropriate factors of industrial disability, I find that the claimant has demonstrated that she has suffered a 40 percent loss of earning capacity. She was 55 years old as of the date of hearing. She worked as a printer at Sutherland Printing for 30 years. This is really the only work she has known in her lifetime. She is no longer able to perform this work due to her permanent restrictions which prevent forceful pinching and grasping. This factor alone demands a finding of a fairly significant industrial disability. The claimant is obviously a bright person. She has some college, however, at age 55 she is unlikely to become retrained into a demand field.

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

Ms. Arthur is receiving long-term disability payments through UNUM and she has applied for Social Security Disability. I find she could re-enter the workforce in an entry-level, unskilled position in the light work category. The fact that Ms. Arthur has not made any significant work search, however, does make it more difficult to fully assess the extent of her disability, and, to some extent, weighs against a finding of a higher industrial disability.

Evaluating her disability objectively as her ability to earn wages in the competitive job market, I find that the claimant has suffered a 40 percent industrial loss, or 200 weeks of benefits. The Fund shall receive a credit of 100 weeks for the benefits owed by the employer for the functional disability in her bilateral upper extremities and a credit of 11 weeks for the first leg injury for a total credit of 111 weeks. The Fund's liability, therefore, is 89 weeks which shall commence upon the completion of the defendant employer's obligation for permanent partial disability payments. See Iowa Code Section 85.64(1) (2015).

ORDER

THEREFORE IT IS ORDERED:

Defendants employer and insurance carrier shall pay the claimant one hundred (100) weeks of permanent partial disability benefits at the rate of four hundred and eighty-seven and 91/100 (\$487.91) per week commencing April 1, 2014.

Defendants employer and insurance carrier shall pay accrued weekly benefits in a lump sum.

Defendants employer and insurance carrier shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants employer and insurance carrier shall be given credit for benefits previously paid as stipulated by the parties.

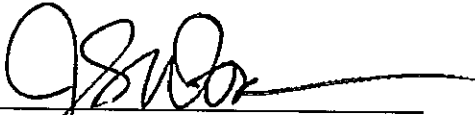
Defendant Fund shall pay the claimant eighty-nine (89) weeks of permanent partial disability benefits at the rate of four hundred and eighty-seven and 91/100 (\$487.91) per week commencing upon the conclusion of defendant employer's obligation to pay permanent partial disability benefits.

Defendant Fund shall pay accrued weekly benefits in a lump-sum.

Defendants employer and insurance carrier shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to the defendants employer and insurance carrier.

Signed and filed this 24th day of March, 2017.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Randall Schueller
Attorney at Law
1311 – 50th ST
West Des Moines, IA 50266
randy@loneylaw.com

Jessica Ruth Voelker
Attorney at Law
7400 College Blvd., Ste. 550
Overland, Park, KS 66210-4031
Jessica.voelker@thehartford.com

Stephanie Jo Copley
Dept. Of Justice-Special Litigation
Hoover State Office Bldg.
Des Moines, IA 50319
stephanie.copley@iowa.gov

JLW/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.