

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

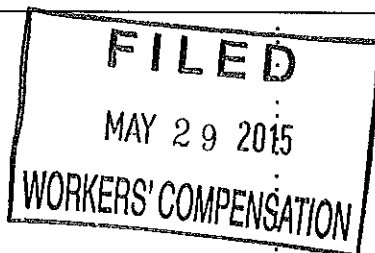
RICK DURHAM,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.



File Nos. 5047157

5047158

5047159

ARBITRATION

DECISION

: Head Note Nos.: 1803; 3203; 3202

STATEMENT OF THE CASE

Claimant, Rick Durham, has filed a petition in arbitration seeking Second Injury Fund Benefits from the State of Iowa, alleging a first qualifying injury to the bilateral upper extremities in 1987 and second injuries occurring on May 7, 2012, June 5, 2013, and November 21, 2013.

The case was heard in Des Moines, Iowa, on April 9, 2015. The record was held open to allow claimant to submit amended settlement documents reflecting the proper date of injury for File No. 5047159 and additional evidence regarding claimant's average weekly earnings on each alleged injury date. Later, it was determined that the average weekly earnings identified on the hearing reports were accurate and no additional evidence was submitted.

Claimant also made a motion to consolidate the three above captioned claims which was granted.

The case was considered fully submitted as of May 1, 2015. The evidence in this case consists of Claimant's Exhibits 1-5 and Defendant's Exhibits A-D, as well as the testimony of the claimant.

ISSUES

1. Whether claimant's bilateral carpal tunnel syndrome was a first qualifying injury;
2. Whether claimant is entitled to Second Injury Fund benefits, and if so,
3. Whether the extent of claimant's industrial disability.

STIPULATIONS

Parties stipulate that claimant was an employee at the time of the alleged injuries. The parties agree that claimant sustained an injury to his left knee on May 7, 2012 and June 5, 2013.

For the stipulated injury date of May 7, 2012, File No. 5047157, the parties stipulate claimant's gross earnings were \$2,105.09 and that he was married and entitled to two exemptions. Claimant's weekly benefit rate would be \$1,247.33.

For the stipulated injury date of June 5, 2013, File No. 5047158, the parties stipulate claimant's gross earnings were \$2,105.09 and that he was married and entitled to two exemptions. Claimant's weekly benefit rate would be \$1,251.35.

For the alleged injury date of November 21, 2013, File No. 5047159 the parties stipulate claimant's gross earnings were \$2,105.09 and that he was married and entitled to two exemptions. Claimant's weekly benefit rate would be \$1,221.98.

FINDINGS OF FACT

Claimant is a 63 year old man at the time of the hearing. His education includes graduation from high school in 1970 and some college.

His employment history is primarily factory work - assembly, machine operation, electrician. For most of his life, he worked for John Deere. He began work there in 1972 and plans to retire shortly.

He was originally hired on to do sheet metal work but moved to the paint department and then into welding and CNC machine operation. He held classifications in both welding and CNC operations.

His current job is as an electrician which he has been doing for the last 20 years. He completed a John Deere electrical apprenticeship for electrical work and holds a master electrician's license (class A). He is required to take three hours of continuing education every three years to maintain his license which is current.

As an electrician for John Deere, he installs and maintains the electrical equipment that is necessary to run the factory - machine tools, conveyor systems, plating systems, etc.

Claimant asserts his first injury started around 1987. He was a production welder wherein he was required to assemble the parts in a fixture, then weld the parts and finally offload the parts onto a skid loader. The job required a lot of material handling and he felt that the continuous use of the hands, particularly the right side which was his weld hand, led to carpal tunnel syndrome.

Irving Wolfe, D.O., performed an IME for claimant on January 15, 2015. (Ex. 3) Claimant relayed his history to Dr. Wolfe. On examination, Dr. Wolfe noted that the claimant's motor strength and range of motion of the upper extremities including the wrist, fingers, and hands, were equal and symmetric bilaterally. (Exhibit 3, page 11) Pin sensation was decreased in the median nerve distributions and there was Tinel's sign on the right wrist and Phalen's sign bilaterally. (Ex. 3, p. 11) Based on the history of the claimant and the slight sensory deficits, Dr. Wolfe assigned a 20 percent impairment of the upper extremities, bilaterally or 12 percent for body as a whole. (Ex. 3, p. 14) Dr. Wolfe believed that claimant had a 50 percent sensory deficit. (Ex. 3, p. 14) Despite working nearly three decades with no restrictions, Dr. Wolfe recommended that claimant refrain from repetitive bending and twisting of his hands at the wrist and repetitive grasping of his right and left hands. (Ex. 3, p. 14)

After the diagnosis of bilateral carpal tunnel syndrome, claimant bid on a different job in the late 80's. He then went into the machining department and became a production machinist. Changing to this different job did help his hands.

Claimant testified that he continues to have problems with his right hand such as tingling and numbness in thumb and pain in the wrist. He sometimes wakes up at night with pain in wrists and hands. He reported to Dr. Wolfe that he has pain on average of 2 on a 10 scale. There are no medical records of claimant's bilateral carpal tunnel injury nor any treatment in recent years. Dr. Wolfe's report includes medical records from Mercy North Family Practice beginning in 2004 and continuing until November 2014. There is no mention of bilateral carpal tunnel symptoms or any pain in the wrists, hands or arms other than the 1983 left wrist laceration and the crush injury of 1972. (Ex. 3, pp. 2-6) Medical complaints during that time period included paresthias in the right lower back, hypertension, right thumb infection, poison ivy on the left hand, c-spine x-ray, right upper back pain, paresthasias of the right arm, right lower quadrant pain, and left forearm pain.

In 2012, claimant injured his left knee. (Ex. B, p. 6) The MRI revealed no obvious meniscal injury. In May of 2013, claimant reinjured his left knee and the subsequent MRI showed a small medial meniscal tear. (Ex. 2, p. 1) Jeffrey P. Davick, M.D., recommended that claimant undergo a knee arthroscopy with a partial medial meniscectomy. (Ex. 2, p. 1) Surgery took place on August 16, 2013 and by September claimant had regained nearly full range of motion. (Ex. 2, p. 5) He was returned to full duty without restrictions on September 9, 2013. (Ex. A, p. 1)

Claimant fell on November 21, 2013. (Ex. A, p. 3, Ex. B, p. 1) Dr. Davick expected the pain and discomfort to resolve over time. (Ex. A, p. 3)

On January 8, 2014, Dr. Davick reported claimant had returned to full duty work without restrictions and assigned a 2 percent impairment to the lower extremity. He also stated that claimant did not sustain any "significant damage to his knee" following the November 21, 2013, injury.

Claimant did report ongoing and unabated pain while using stairs throughout 2012, 2013, and into 2014. (Ex. B) On June 5, 2013, he reported to the employer clinic that "his knee has never gotten better from his previous injury and has always bothered him. Feels fine when he walks, bothers him most when he is doing stairs and ladders." (Ex. B, p. 2)

On September 29, 2014, claimant sustained a right partial thickness rotator cuff tear. (Ex. C, p. 3)

Dr. Wolfe noted that claimant's knee injuries occurred on May 7, 2012, June 5, 2013, and January 2, 2014. (Ex. 3, p. 7-8) The medical records are not entirely clear as to the date of each injury. In the June 15, 2015, IME report, Dr. Wolfe assigned Durham a zero percent whole person rating for the slip and fall injury of November 21, 2013, and noted that the physical examination performed on January 15, 2015, "revealed no abnormal range of motion of the left knee and normal strength and sensation of the left lower extremity." (Ex. 3, p. 13) However, based on the endoscopic surgery and ongoing pain, Dr. Wolfe assigned a 10 percent impairment of the whole person and recommended restrictions of limited ladder and stair climb, limited squatting, limited bending of the left knee, no crawling, and limited kneeling. (Ex. 3, p. 14)

He belongs to the United Autoworkers, has protection under union contract, and therefore claimant was allowed to self-restrict, choosing to do jobs that required less physical labor and more troubleshooting. If there is a task that he cannot do, he tells his boss he cannot do it and his boss sends someone else to do it.

Dr. Wolfe said that there were damages to claimant's knees that never fully healed between injuries.

Claimant testified that most electrical work is high or on the ground requiring the use of either a ladder or kneeling on the ground. Uneven ground, climbing and descending stairs and ladders results in pain in the left knee.

He does not believe he could do factory work as he could not stand on his feet all day and any other job would require extensive use of his hands which would cause him a great deal of pain. He does not believe he could operate a crane or do sheet metal work.

He testified that he cannot clean out gutters because of the requirement of a ladder and cannot plant flowers because it requires him to kneel. He cannot weed the garden or even cut his own fingernails or toenails because he is unable to hold the tools. He testified that once a newspaper fell out of his hand and he had a difficult time with a coffee cup.

He is unable to work overtime due to the work available being construction work which is outside of his personal restrictions. Claimant testified that he is retiring because of the pain in his hands and knees.

The credible evidence as it pertains to claimant's bilateral extremities is that he has some pain and discomfort from use but that it has not prevented him from pursuing a career as an electrician and obtaining and maintaining his master electrician status. The 50 percent sensory loss and 20 percent bilateral functional loss is not consistent with the behavior and work history of the claimant. Claimant's testimony is that he has pain and tingling and numbness and that it occasionally prevents him from performing work tasks and engaging leisure activities.

As it relates to claimant's lower extremities, it is determined that claimant sustained a left lower extremity injury on May 7, 2012, which healed but was re-aggravated by a fall in May or June of 2013. After the mid 2013 fall, tests revealed claimant had sustained a meniscal tear which was surgically repaired. Dr. Davick, claimant's treating physician, assessed a 2 percent impairment rating of claimant's left knee as opposed to Dr. Wolfe's 10 percent impairment rating. Given Dr. Wolfe's overreach on the impairment of claimant's bilateral extremities, Dr. Davick's opinions are given more weight and found to be more reliable.

Claimant did not miss any work nor did he do any light-duty work as a result of his injury on any of the three injury dates.

Dr. Davick did not find that claimant sustained a re-aggravation of his left lower knee injury as a result of the November 21, 2013, slip and fall. Further, Dr. Wolfe also assigned a zero percent whole person rating following the November 21, 2013 injury. It is found that the November 21, 2013, injury did not have any permanent or lasting effects.

Claimant worked less hours in 2014 than he worked in 2011. Claimant testified that he attributed that to lower overtime. He is unable to do the overtime because the work available for overtime employees is too strenuous. Claimant testified that he believed that he would make half in 2015 as he did prior to his knee injuries in 2011. There was no explanation as to why there would be such a drastic drop from his 2014 earnings of \$92,000 to 2015 earnings.

CONCLUSIONS OF LAW

The sole issue presented for determination is whether claimant established a first qualifying injury to generate a claim for Second Injury Fund Benefits. 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, Iowa Workers' Compensation Law and Practice, Section 17-1, (2006).

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 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).

The Fund asserts that there is no first qualifying injury. Claimant was diagnosed with bilateral carpal tunnel syndrome in the 80s, but received no remarkable treatment, no restrictions. He has worked as an electrician which requires the use of his hands regularly for over 20 years. There are no medical records pertaining to claimant's bilateral carpal tunnel syndrome. Dr. Wolfe's opinions regarding claimant's bilateral carpal tunnel syndrome stem from claimant's history and a few wrist and hand tests. Motor strength, flexion and extension of the fingers and grip strength were graded as 5/5 and equal and symmetric bilateral. (Ex. 3, p. 11) During the sensory examinations, claimant exhibited decreased pin sensation in the median nerve distributions bilaterally, as well as a positive Tinel's test on the right and a positive Phalen's sign bilaterally. (Ex. 3, p. 11) Based on these tests, Dr. Wolfe extrapolated claimant sustained a 20 percent loss of function on both sides and a 50 percent reduction in sensation. Despite this, claimant continues to work as an electrician.

According to the Iowa Supreme Court in Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990) and Second Injury Fund of Iowa v. George, 737 N.W.2d 141 (Iowa 2007), unresisted expert testimony establishing a scheduled member loss of use is sufficient to invoke Fund benefits. See also: Bradley J. Henry v. Van Osdel Plastering & Drywall, Inc. and Second Injury Fund, File No. 5017090, (Appeal May 1, 2015).

Therefore because Dr. Wolfe found claimant had sustained a bilateral carpal tunnel syndrome which results in some ongoing impairment, claimant has met his burden that he has sustained a first qualifying injury. Dr. Wolfe's assessment that claimant suffers from a 50 percent sensory loss and a 20 percent functional impairment on either upper extremity is not consistent with claimant's 25 year work history as an electrician and his master electrician status. While claimant testified that because of his seniority, he is able to modify his work duties without formal restrictions, he was not always the most senior person in his job, particularly when claimant first developed the bilateral carpal tunnel syndrome. Dr. Wolfe's IME results for claimant's bilateral carpal tunnel syndrome is problematic for those reasons.

The claimant asserts that he sustained a second qualifying injury to the left lower extremity one of the following three dates: May 7, 2012, June 5, 2013, and November 21, 2013. Claimant was returned to work without restrictions after each of the three work injuries, but at least one necessitated arthroscopic surgery to repair a

torn left knee meniscus. Dr. Davick provided a 2 percent impairment rating for this left knee injury.

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).

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 is a 63 year old person with a high school education. He has specialized skill in the electrical field and maintains his master electrician's license. He testified that he is limited in the work that he can do due to his physical restrictions. The falls of May 2012 and May or June 2013 resulted in a weakened left lower extremity that caused pain and discomfort as a result of use. Dr. Wolfe assigned a 10 percent total impairment rating for the left knee where as Dr. Davick assigned a 2 percent impairment rating and no restrictions. From 2011 to 2014, claimant has seen an approximate 30 percent reduction in hours due to loss of overtime.

While claimant testified that he would see an even greater erosion in 2015 in his earnings, there was no explanation for this. His injury occurred in 2013 and he reached maximum medical improvement in September of 2013. His year of earnings in 2014 reflected a decline in overtime. Why there would be another precipitous drop from 2014 to 2015 was unexplained and therefore not used in evaluating industrial disability

because there is no satisfactory correlation in the record between the drop of earnings or hours worked between 2014 and 2015 and claimant's injury.

Based on the foregoing, it is determined that claimant has sustained an industrial loss of 30 percent.

Industrial disability benefits are awarded on a 500-week schedule. Iowa Code section 85.34(2)(u). A 30 percent industrial disability award results in claimant's total entitlement being 150 weeks of benefits. However, the Second Injury Fund of Iowa is entitled to a credit for the permanent impairment attributable to both the first and second qualifying injuries. Iowa Code section 85.64.

The Fund is entitled to a credit of 108.8 weeks.

ORDER

THEREFORE IT IS ORDERED:

That defendant is to pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of one thousand two hundred fifty-one and 35/100 dollars (\$1,251.35) per week from September 9, 2013, less the credit of one hundred eight point eight (108.8) weeks.


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 is to be given credit for one hundred eight point eight (108.8) weeks.

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

Signed and filed this 29th day of May, 2015.


JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/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.