

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MYRON MEADER,

File No. 5057325

Claimant,

A P P E A L

vs.

D E C I S I O N

SECOND INJURY FUND OF IOWA,

Defendant.

Head Note Nos: 1803, 1804, 3202

Defendant Second Injury Fund of Iowa (the Fund) appeals from an arbitration decision filed on June 6, 2018. Claimant Myron Meader responds to the appeal. The case was heard on October 26, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 1, 2017.

The deputy commissioner found claimant carried his burden of proof to establish he sustained a first qualifying injury to his left hand in 2003, and a second qualifying work-related injury to his left lower extremity on June 10, 2015, for the purpose of receiving benefits from the Fund. The deputy commissioner found that as a result of the two injuries taken together, claimant is permanently and totally disabled, which entitles claimant to receive permanent total disability benefits from the Fund after the Fund receives the appropriate credits for the qualifying injuries. The deputy commissioner found the Fund is entitled to receive a credit of 38 weeks for the first qualifying injury, and the deputy commissioner found the Fund is entitled to a credit of 48.4 weeks for the work injury, for a total credit 86.4 weeks following March 26, 2016. The deputy commissioner found the Fund is not entitled to receive an additional requested credit of 81.4 weeks, for 37 percent permanent disability of claimant's left lower extremity which pre-existed the June 10, 2015, work injury.

The Fund asserts on appeal that the deputy commissioner erred in finding claimant is permanently and totally disabled as a result of the two injuries taken together. The Fund asserts the deputy commissioner erred in failing to award the additional requested credit of 81.4 weeks for permanent disability of claimant's left lower extremity which pre-existed the June 10, 2015, work injury. The Fund asserts the deputy commissioner erred in finding the Fund is entitled to receive a credit of 48.4 weeks for the work injury when the parties stipulated that the Fund is entitled to a credit of 61.52 weeks for the work injury.

Claimant concedes on appeal that the deputy commissioner erred in finding the Fund is entitled to a credit of 48.4 weeks for the work injury, and claimant agrees the Fund is entitled to the stipulated credit of 61.52 weeks for the work injury. (Claimant's

Appeal Brief, p. 16) Claimant asserts the deputy commissioner's finding that claimant is permanently and totally disabled as a result of the two injuries taken together should be affirmed. Claimant asserts the deputy commissioner's finding that the Fund is not entitled to receive an additional credit of 81.4 weeks for permanent disability of claimant's left lower extremity that pre-existed the work injury should also be affirmed.

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

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed in this matter on June 6, 2018, which relate to the following issues:

I affirm the deputy commissioner's finding that claimant carried his burden of proof to establish he sustained a first qualifying injury to his left hand in 2003, and a second qualifying work-related injury to his left lower extremity on June 10, 2015, for the purpose of receiving benefits from the Fund.

I affirm the deputy commissioner's finding that as a result of the two injuries taken together, claimant is permanently and totally disabled, which entitles claimant to receive permanent total disability benefits from the Fund after the appropriate credits are applied for the first and second qualifying injuries.

I affirm the deputy commissioner's finding that the Fund is entitled to a credit of 38 weeks for the first qualifying injury.

I respectfully modify the deputy commissioner's finding that the Fund is entitled to a credit of 48.4 weeks for the June 10, 2015, work injury, and I find the Fund is entitled to a credit of 61.52 weeks for the work injury pursuant to the parties' stipulation.

I respectfully reverse the deputy commissioner's finding that the Fund is not entitled to receive the additional requested credit of 81.4 weeks, for 37 percent permanent disability of claimant's left lower extremity which pre-existed the June 10, 2015, work injury. I provide the following analysis for my decision in that regard:

In Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808 (Iowa 1994), the Iowa Supreme Court held there is no requirement that a qualifying first injury must be pled by a claimant in order for it to qualify as a prior loss for purposes of a claim against the Fund. 516 N.W.2d at 816. Furthermore, it has been longstanding precedent that, for purposes of a claim against the Fund, a claimant may plead a second qualifying injury which involves the same scheduled member as the first qualifying injury, so long as the first qualifying injury also involves another scheduled member. See Second Injury Fund of Iowa v. George, 737 N.W.2d 141 (Iowa 2007).

Similar to Shank, this matter involves the type of situation in which the Fund should be allowed credit for the permanent disability attributable to claimant's left leg condition which existed prior to the work-related left leg injury which occurred on June 10, 2015. The undisputed evidence establishes claimant already had substantial disability of his left knee prior to the June 10, 2015, work injury. Claimant first injured his left knee in the early 1970s while in the U.S. Army Reserves, and he had several surgeries performed on his left knee after that initial injury and prior to the June 10, 2015, work injury, including a total knee replacement and a subsequent revision of that replacement in the two years prior to the 2015 work injury. (Hearing Transcript, pp. 46, 49-51; Joint Exhibit 4, pp. 3, 7)

Aside from the several prior surgical procedures, the evidence also establishes claimant had significant limitations with the left leg prior to the June 2015 work injury. Claimant testified that prior to the 2015 work injury, his left knee gave him difficulty if he overworked it. (Tr. p. 47) Prior to the 2015 injury, claimant was told by his treating physicians not to run or jump, and also to avoid squatting, bending and kneeling on the left knee. (Tr. pp. 59-60) Also, treatment records from the date of the June 10, 2015, work injury indicate that before the June 10, 2015, injury, claimant had episodes of instability in his left knee at least three or four times per week. (Tr. pp. 55-56; JE1, p. 1; JE4, p. 7) Claimant also receives, and will receive for the remainder of his life, a \$3,000.00 per month pension payment from the Veterans Administration for a 100 percent military service-related disability of his left knee, for which he applied prior to the 2015 work injury. (Tr. pp. 62-63, 71; JE4, p. 6)

Claimant asserts on appeal that the Fund should not be allowed to receive a credit for claimant's left leg condition which existed prior to June 10, 2015, without a supporting medical opinion because this would be speculative. However, under the undisputed facts of this case, I agree with the Fund's contention that to allow such a credit in this specific case is not speculative.

The Fund requests that it be given an additional credit of 37 percent of claimant's left lower extremity, or 81.4 weeks, for claimant's left leg disability which pre-existed the June 10, 2015, work injury. Under the AMA Guides, Fifth Edition, Table 17-33, p. 547, a total knee replacement yields a compulsory rating of at least 37 percent of the lower extremity. (JE8, pp. 5-6) The Fund asserts that while a reasonable argument could be made that due to claimant having had two knee replacement surgeries, and a revision surgery prior to the June 10, 2015, work injury, claimant's left lower extremity disability prior to June 10, 2015, might have exceeded 37 percent, the Fund is not requesting a finding of permanent disability greater than 37 percent. Instead, the Fund asks this agency to allow the Fund to take credit for claimant's pre-June 10, 2015, left leg disability in the lowest possible amount, which is 37 percent of the left lower extremity, pursuant to the compulsory rating of the AMA Guides, Fifth Edition.

I agree with the Fund's contention that for this agency to not allow the Fund to assert a credit for claimant's left leg disability which pre-existed the June 10, 2015, work injury because of a lack of an impairment rating would create an unfair double standard against the Fund because impairment ratings have not been required for claimants in finding qualifying fist injuries:

A medical impairment rating is not an absolute legal requirement. A deputy can properly find a qualifying loss from other evidence such as the fact of a surgery, a medically advised job change or a loss of job. If the employee is found to be credible, medical records are not required. So long as a prior loss of use is established and some measure of degree can be placed upon it, even if only by judgment of the deputy, a qualifying first loss can be established.

George v. Second Injury Fund of Iowa, File No. 5001966 (App. Nov. 1, 2004. See also Vandekamp v. Second Injury Fund of Iowa, File No. 5023229 (Arb. August 25, 2008, affirmed App. May 21, 2009) (finding qualifying first injury through lay testimony by claimant of prior surgeries and reduced ability to run and stand for prolonged periods of time, despite no physicians assigning impairment).

In this case, claimant offered un rebutted testimony indicating he had several surgeries on the left knee before the June 20, 2015 work injury, including two knee replacements and a revision (Tr. pp. 48-51), which was corroborated by Dr. Kuhnlein (JE4, p. 3), and by his treating physicians (JE 1, pp. 1, 21, 24), and claimant was found to be "highly credible" by the deputy commissioner. (Arbitration Decision, p. 2)

I therefore find the Fund is entitled to a credit of 38 weeks for the 2003 first qualifying injury to his left hand, I find the Fund is entitled to a credit of 61.52 weeks for the June 10, 2015, second qualifying work-related left leg injury, and I find the Fund is entitled to an additional credit of 81.4 weeks for the 37 percent permanent disability of claimant's left leg which pre-existed the June 10, 2015, work injury, for a total credit to the Fund of 180.92 weeks following March 26, 2016.

#### ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 6, 2018, is affirmed in part and is modified in part.

All benefits shall be paid at the stipulated weekly rate of one hundred ninety-nine and 72/100 dollars (\$199.72).

The Second Injury Fund of Iowa shall pay claimant permanent total disability commencing 180.92 weeks following March 26, 2016.

Interest will accrue on unpaid Fund benefits when those benefits begin to accrue 180.92 weeks following March 26, 2016, at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of this decision, plus two (2) percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Pursuant to rule 876 IAC 3.1(2), the Fund shall file subsequent reports of injury as required by this agency.

Signed and filed on this 25<sup>th</sup> day of November, 2019.



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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

The parties have been served as follows:

Dustin M. Mueller          Via WCES

Jonathan Bergman          Via WCES