BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WESLEY RAINER, Claimant, vs. NORDSTROM, Employer, Self-Insured, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 5068419 ARBITRATION DECISION Head Notes: 2907, 3001, 3002, 3202

STATEMENT OF THE CASE

Wesley Rainer, claimant, filed a petition for arbitration against Nordstrom and asserted a separate claim against the Second Injury Fund of Iowa. This case came before the undersigned for an arbitration hearing on April 23, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines, Iowa. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall. The hearing proceeded without significant difficulties.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 4, and Defendant Employer Exhibits A and B. All exhibits were received without objection.

Claimant testified on his own behalf. No other witnesses testified at hearing. The evidentiary record closed at the conclusion of the evidentiary hearing. All parties served their post-hearing briefs on June 7, 2021, at which time this case was deemed fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Claimant's average gross weekly wage at the time of the September 27, 2018, work injury and the corresponding applicable weekly worker's compensation rate;

2. Whether claimant is entitled to reimbursement of his independent medical examination fees pursuant to Iowa Code section 85.39;

3. Whether claimant has established a compensable claim against the Second Injury Fund of Iowa, including whether claimant has established a qualifying first injury;

4. The extent of claimant's entitlement, if any, to benefits from the Second Injury Fund of Iowa; and

5. Whether costs should be assessed against any party and, if so, in what amount.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

On the date of hearing, Wesley Rainer was a 33-year-old gentleman residing in Dubuque, Iowa. (Hearing Transcript, page 9)

Mr. Rainer graduated from South Shore High School in Chicago, Illinois in 2006. (Hr. Tr., p. 10) He would go on to study business management, marketing, and criminal justice at Malcolm X Community College from 2006 to 2009, and at Northeast Iowa Community College (NICC) from 2010 to 2011. (Hr. Tr., pp. 10-11) He did not obtain a degree from either institution. He obtained a welding certificate from NICC in 2019. (Hr. Tr., p. 11)

Mr. Rainer began working for Nordstrom in December, 2011. (Hr. Tr., p. 14) At the time of his injury, Mr. Rainer had recently transitioned into a part-time position processing 808 returns. (See Hr. Tr., pp. 15, 42) Up until late July, 2018, claimant worked as an overnight assistant manager in the outbound department. (See Hr. Tr., p. 15; see also Ex. B, p. 27) The assistant manager position was a salaried position. The processing position was paid on an hourly basis. (See Hr. Tr., pp. 47-48) Claimant last worked for the defendant employer in December, 2018, when he was terminated for absenteeism. (See Hr. Tr., p. 16) At the time of his termination, Mr. Rainer was working part-time while he pursued a certificate in welding from NICC. (See Hr. Tr., pp. 55-56)

Today, claimant works full-time as a welder for John Deere in Dubuque, Iowa. (Hr. Tr., p. 17) He has done so since August 2019. (Hr. Tr., p. 57) He makes between $24.00 and $27.00 per hour. (Hr. Tr., p. 57) Claimant also owns and operates a Chicago-style hot dog stand in the Dubuque, Iowa area. (Hr. Tr., p. 19) Claimant

estimated that he made $10,000.00 in profit in 2020, his second year of operation. (Hr. Tr., p. 59)

Mr. Rainer sustained a work-related left knee injury on September 27, 2018. On the date of injury, Mr. Rainer was attempting to pick up some boxes that had fallen to the floor. When he stood up from a squatting position, he felt a "pop" and immediate pain in his left knee. Mr. Rainer attempted to walk it off, but the pain quickly worsened to include the posterior and anterior knee. (Joint Exhibit 1, pp. 1, 11) Diagnostic imaging would later reveal tearing of the posterior horn and body of the medial meniscus. (JE1, p. 14)

Mr. Rainer's left knee required a partial meniscectomy. (JE4, p. 34) Claimant reached maximum medical improvement and was released without restrictions on February 8, 2019. (JE3, p. 32) Outside of independent medical examinations, claimant has not presented for any additional medical treatment for the left knee since being released. (Hr. Tr., p. 60)

Claimant's left knee was last examined on October 30, 2019. (See Ex. 2, p. 5) Claimant presented to the examination with a normal gait. (Ex. 2, p. 5) He had full extension of both knees with 120 degrees of flexion on the left and 130 degrees on the right. (Id.) He had good strength throughout both lower extremities, and his sensory exam was unremarkable. (Id.) Examination of the left knee also revealed crepitus and pain over and around the medial joint line. (Id.)

At hearing, Mr. Rainer testified to his ongoing left knee symptoms. He testified his left knee continues to "pop" from time to time, it's hard for him to come up out of a deep squat, and his knee feels unstable. (Hr. Tr., pp. 27-28) Claimant also testified that his left knee will ache if he stands for too long. (Hr. Tr., p. 28) He addresses his ongoing symptoms with IcyHot, rest, and elevation. (Hr. Tr., p. 29)

The parties stipulate that claimant sustained two percent (2%) lower extremity impairment as a result of the left knee injury. (Hearing Report) No physician has assigned permanent restrictions with respect to the left lower extremity injury. (Hr. Tr., p. 60)

Mr. Rainer alleges a claim for benefits against the Second Injury Fund of Iowa. Given that the September 27, 2018, injury is stipulated to be a left leg injury, claimant has established a qualifying second injury for purposes of the Second Injury Fund; however, there is a dispute as to whether Mr. Rainer has proven a first qualifying injury.

On the hearing report, Mr. Rainer alleges an initial qualifying injury to the right hand occurred on June 24, 2011. At the time of the alleged first qualifying injury, claimant was working for McDonald's. (Hr. Tr., p. 27) On June 24, 2011, Mr. Rainer sustained a laceration to the base of his right thumb when he reached into a dish rack and encountered an upward facing Cutco knife. (Hr. Tr., p. 25)

Shortly after the injury occurred, claimant presented to the emergency department at Mercy Medical Center with complaints of sensory decrease on the ulnar thumb and weakness in flexion. (JE5, p. 37) Claimant's laceration was irrigated, closed

with sutures, bandaged, and splinted. (Id.) The attending physician instructed claimant to follow-up with orthopedics. (Id.)

On June 29, 2011, claimant presented for an evaluation of his right thumb with orthopedic surgeon, Brian Adams, M.D. (JE5, p. 42) Dr. Adams diagnosed claimant with a laceration to the volar ulnar aspect of his thumb, extending proximally to the IP joint with potential ulnar digital nerve injury. (JE5, p. 43) According to Dr. Adams, claimant's options included surgical intervention, or waiting to determine whether the digital nerve would improve. (Id.) Claimant elected to undergo surgical intervention. (Id.)

Dr. Adams performed a nerve exploration and repair on June 30, 2011. (JE5, p. 46) Dr. Adams repaired the radial digital nerve and the flexor pollicis longus tendon. (Id.)

Claimant continued to endorse decreased sensation over the ulnar and radial aspect of his thumb at his initial post-op appointment. (JE5, pp. 49-50) Fortunately, it appears claimant regained sensation in his thumb prior to being released by Dr. Adams on August 31, 2011. (See JE5, pp. 53, 55) At the time of his release, claimant's right IP joint range of motion was 5 degrees of hyperextension to 35 degrees of flexion. (JE5, p. 69) In comparison, claimant reached 55 degrees of flexion in his left IP joint. (Id.)

Notably, Dr. Adams discovered two small ganglion cysts bilaterally at the SL joint of claimant's wrists at the August 31, 2011, appointment. (JE5, pp. 54-55) Claimant experienced pain in both cysts with palpation. (JE5, p. 55) Dr. Adams believed claimant's wrist pain stemmed from either the ganglion cysts or disuse caused by his June 24, 2011 injury. (Id.)

At hearing, claimant physically demonstrated his ongoing issues with range of motion in the right thumb. (See Hr. Tr., pp. 29-31) Claimant was able to touch the palm of his hand with his left thumb; however, he could not do the same with the right thumb. (See Hr. Tr., pp. 30-31) Claimant has had to change the way he lifts and/or uses certain items due to the loss of range of motion and its resulting impact on his grip strength. For instance, claimant testified he prefers a specific type of welding gun at work. According to claimant, there are two main types of welding guns: ones with triggers in the front, and ones with triggers on the back. Claimant uses a welding gun with a trigger in the front. It appears claimant can still use a welding gun with the trigger on the back; however, he experiences pain in his thumb if he uses it on "long welds." (See Hr. Tr., p. 32) Additionally, claimant testified he can no longer write as long as he used to because his hand will cramp up. (Hr. Tr., p. 36)

Mr. Rainer did not seek any additional treatment for his right thumb between August 2011 and the September 27, 2018, work injury. Mr. Rainer conceded on cross-examination that no physician placed work restrictions on him as a result of the right thumb injury prior to September 27, 2018. After he recovered from his right hand surgery, he obtained employment at Nordstrom, beginning in December 2011. (Hr. Tr., p. 14) His job duties included lifting upwards of 75 pounds, checking items for quality, repackaging, clearing the 808 return line of empty boxes, and loading and unloading

trailers. (See Hr. Tr., pp. 15-16) There is no indication in the evidentiary record that Mr. Rainer had any difficulty completing these job duties due to his right thumb/hand injury.

In support of his Second Injury Fund claim, Mr. Rainer sought an independent medical examination from Mark Taylor, M.D. (Ex. 2, p. 4) The examination occurred on October 30, 2019. (Id.) Claimant reported numbness in his right thumb, but not much pain. (Ex. 2, p. 5) Interestingly, claimant also reported numbness and tingling in his fingers bilaterally, and occasional elbow pain of unclear etiology. (Id.) Claimant had a positive Phalen's test in both hands within 15 seconds. Tinel's testing was also positive over the median distributions bilaterally. (Id.) Given these findings, Dr. Taylor recommended that claimant undergo further evaluation with his primary care provider for the above issues. (Ex. 2, p. 6) The undersigned is fairly concerned with this recommendation from Dr. Taylor. It certainly appears as though Dr. Taylor is suggesting claimant be evaluated for potential carpal tunnel syndrome, yet he makes no reference to carpal tunnel syndrome or its potential impact, if any, on claimant's range of motion measurements.

It is also worth noting that claimant's pain diagram from the IME does not expressly endorse any pain symptoms in the right thumb. Claimant endorsed aching in his bilateral elbows, wrists, and left knee; pins and needles in his bilateral fingers and elbows; and numbness in his bilateral fingers. (Ex. 2, p. 8)

On examination, claimant demonstrated good strength over the elbows and wrists, as well as good overall grip strength and strength of the intrinsic muscles of his hands. (Ex. 2, p. 5) Dr. Taylor assigned seven percent (7%) right thumb impairment (rounded up from 6.5%), or three percent (3%) hand impairment based on the range of motion deficits in claimant's thumb. (Ex. 2, p. 6) Dr. Taylor did not provide any recommendations for permanent restrictions despite being asked to address the same in his report. (See Ex. 2, p. 3)

The Second Injury Fund questions the methodology for Dr. Taylor's permanent impairment rating through argument. It did not obtain a rebuttal report addressing the same. The Second Injury Fund asserts it is unclear how Dr. Taylor reached his impairment rating. I disagree.

According to Dr. Taylor's IME report, he utilized Figure 16-12, Figure 16-15, Table 16-8(a), Table 16-8(b), and Table 16-9. Claimant's range of motion measurements on the date of examination were as followed:

	Right Thumb	**Left Thumb**
Flexion @ IP	50	75
Extension @ IP	0	30
Flexion @ MP	60	70
Extension @ MP	20	Neutral
Radial Abduction	35	60
Adduction	2 cm	2 cm
Opposition	7 cm	8 cm

The measurements reported in the impairment tables and pie charts reflect the accepted average active range(s) of motion for each joint. However, certain people can have either lesser or greater joint flexibility than average. For this reason, it is important to compare measurements of the relevant joint(s) in both extremities. According to the Guides, if the "normal" joint has a less than average mobility, the impairment value corresponding to the uninvolved joint serves as a baseline and is subtracted from the calculated impairment for the involved joint. AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, p. 453. It is clear Dr. Taylor applied this principal when assessing claimant's permanent impairment.

	Right	Impairment	Left	Impairment	Total
Flexion IP	50	*2%*	75	*.5%*	**1.5%**
Extension IP	0	*1%*	30	*0%*	**1%**
Flexion MP	60	*0%*	70	*0%*	**0%**
Extension MP	20	*0%*	Neutral	*0%*	**0%**
Radial Abduction	35	*3%*	60	*0%*	**3%**
Adduction	2 cm	*1%*	2 cm	*1%*	**0%**
Opposition	7 cm	*1%*	8 cm	*0%*	**1%**
				Total	**6.5%**

As the above table shows, Mr. Rainer's left thumb has less than average mobility with respect to IP flexion and adduction. As such, 1.5 percent is subtracted from the combined impairment rating assigned to the right thumb (8 percent), for a total impairment rating of 6.5 percent. Utilizing Table 16-1, on page 438, this converts to 3 percent right hand impairment. (Ex. 2, p. 6)

Dr. Taylor's opinions pertaining to the first qualifying injury are not rebutted in the evidentiary record. I accept Dr. Taylor's permanent impairment rating and find claimant has proven 3 percent hand impairment as a result of the June 24, 2011, injury. As such, I find that claimant has proven permanent disability to both his right upper extremity as a result of the June 24, 2011, injury, and to his left lower extremity as a result of the September 27, 2018, work injury. I also find that claimant has proven that these injuries have produced a combined loss of future earning capacity, albeit minimal.

Having found claimant carried his burden of proving both a first and second qualifying injury, I must now determine claimant's loss of earning capacity.

At the time of the evidentiary hearing, claimant was 33 years old. While he is no longer employed with the defendant employer, he is employed in a full-time welding position with John Deere. In addition to his full-time work for John Deere, claimant owns and operates a hot dog stand five days each week. By all accounts, claimant is a hard-working and driven individual. He is not operating under any permanent restrictions at this time. Claimant continues to complain of symptoms in both his left

knee and right dominant hand; however, he has not presented for any additional medical treatment for either condition since being released by Dr. Adams and Dr. Schemmel. He is not actively seeking treatment for his conditions. He is not taking any prescription medications for his conditions at this time.

I find claimant has proven only a modest loss of future earning capacity. Considering his educational background, employment history, age, subsequent employment, and minimal permanent impairment ratings, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Rainer has proven he sustained a five percent (5%) loss of future earning capacity as a result of the combined effects of the June 24, 2011, and September 27, 2018, injuries.

There is a dispute about the rate at which Mr. Rainer's weekly benefits should be paid. The defendant employer's rate calculation results in an average weekly rate of $910.91, and a weekly workers' compensation benefit rate of $586.14. (Ex. B, p. 3) Mr. Rainer's rate calculation results in an average weekly rate of $937.26, and a weekly workers' compensation benefit rate of $601.40. (Ex. 4, p. 14)

Review of the parties' respective positions on this issue reveals the primary dispute is the extent to which claimant's annual bonus is included in the average weekly wage calculation. Claimant contends the entire amount of the bonus should be included in his rate calculation, while defendants assert a fraction of the bonus should be applied.

Claimant received an annual bonus of $1,976.13 in March 2018. (Ex. B, p. 18) Claimant does not know how the bonus was calculated, just that he received it for being an assistant manager in the outbound department in 2017. (Hr. Tr., pp. 51-52) Because the bonus is for work claimant did in 2017, defendants assert the entire amount of the bonus should not be included in claimant's rate calculation. Instead, defendants assert the amount of the bonus ($1,976.13) should be divided by 12 ($164.68) – not the customary 52 since the parties assert the relevant time period for rate calculation purposes is September 2017 through August 2018 – and then multiplied by four to represent the only four months from 2017 relevant to the rate calculation (September, October, November, December). There is no evidence claimant received a bonus for his work in 2018. There is no evidence that the bonus had been paid consistently in the past.

At this juncture, it is worth noting that the parties incorrectly assert claimant is a part-time employee for purposes of rate calculation. Iowa Code section 85.36(9), requires a finding that the claimant was earning less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality. There was no testimony about what a regular full-time adult laborer in claimant's position or similar positions earned in the locality he was injured. Thus, Iowa Code section 85.36(6) remains the best calculation based on the evidence in the record.

For reasons that will be discussed in the Conclusions of Law section, I find claimant's weekly compensation rate to be $620.18

Claimant brought a successful petition in arbitration. Therefore, costs will be assessed in the conclusions of law section.

CONCLUSIONS OF LAW

Mr. Rainer seeks an award of benefits from the Second Injury Fund of Iowa. 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. Iowa Code section 85.64

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); 15 Iowa Practice, Workers' Compensation, Lawyer, section 17:1, p. 211 (2014-2015).

In this case, Mr. Rainer alleges he sustained a first qualifying injury to his right hand on June 24, 2011. Mr. Rainer relies upon the expert medical opinions of Dr. Taylor to support his contentions and to establish permanent functional impairment of the right hand prior to September 27, 2018. The Second Injury Fund appears to concede that claimant sustained an injury to his right thumb/hand on June 24, 2011; however, it denies that claimant has proven he sustained permanent functional loss of the right hand prior to the September 27, 2018, work injury.

Ultimately, I accepted the unrebutted expert opinion of Dr. Taylor with respect to Mr. Rainer's right hand injury, and found claimant sustained permanent disability as a result of the June 24, 2011, injury. I therefore found claimant carried his burden of proving he sustained a first qualifying injury on or about June 24, 2011.

The right hand injury had minimal impact on claimant's earning capacity prior to September 27, 2018. That being said, Dr. Taylor documented the deficits in range of motion claimant experiences as a direct result of the June 24, 2011, work injury. Dr. Taylor's opinions are unrebutted. While the undersigned is certainly concerned with Dr. Taylor's clear references to alternative issues with claimant's hands, I decline the opportunity to speculate or extrapolate on Dr. Taylor's findings. Moreover, the fact still remains that the issues in claimant's hands were more prominent on the right. (See Ex. 2, p. 4)

Dr. Taylor assigned seven percent right hand impairment as a result of the June 24, 2011, injury. As such, I found claimant carried his burden of proving he sustained seven percent permanent impairment of the right hand as a result of the June 24, 2011, injury.

Having found claimant carried his burden of proving permanent disability to the right hand as a result of the June 24, 2011, injury, as well as permanent disability to the left leg as a result of the September 27, 2018, work injury, I conclude claimant carried his burden of proving a compensable claim against the Second Injury Fund. Iowa Code section 85.64.

The Second Injury Fund is responsible 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 355 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1979).

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). The analysis now also requires consideration of claimant's proximity to retirement.

Compensation for industrial disability shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34. However, the Second Injury Fund is entitled to a credit for all permanent disability attributable to either of the qualifying scheduled member injuries.

In this case, I found Mr. Rainer sustained five percent loss of earning capacity as a result of the combined effects of the first and second qualifying injuries. This is equivalent to 25 weeks of permanent partial disability benefits. The parties stipulated that the employer owes claimant 4.4 weeks of permanent partial disability benefits for the September 27, 2018, left leg injury. I found claimant sustained three percent right hand impairment as a result of the June 17, 2011, injury. Three percent of the right hand is equivalent to 5.7 weeks of permanent partial disability benefits.

Therefore, I conclude, and the parties stipulate, the Second Injury Fund is entitled to 10.1 weeks of credit against the industrial disability award. Reducing the 25 weeks by this credit, I conclude claimant is entitled to an award form the Second Injury Fund in the amount of 14.9 weeks of benefits. Permanent partial disability benefits from the Second Injury Fund shall commence upon the expiration of the employer's obligation to pay benefits for the second injury. Iowa Code section 85.64(1).

The parties stipulated that the benefits owed by the employer and insurance carrier should commence on February 8, 2019. (Hearing Report) The parties further stipulate that Fund liability commences on March 15, 2019 and continues until the Fund's weekly benefits obligations are exhausted.

I will now address the issue of Mr. Rainer's compensation rate. Both parties attempted to use Iowa Code subsection 85.36(9) and averaged claimant's total earnings from all of his employment for the previous 12 months before his work injury to arrive at an average gross rate of weekly earnings. The party asserting application of Iowa Code section 85.36(9) has the burden of proving that the employee earned less than the usual weekly earnings of the regular full-time adult laborer in his or her field. In this case, both parties are asserting application of section 85.36(9); however, neither party submitted evidence regarding the same.

The Iowa Supreme Court has provided guidance as to determine when to use Section 85.36(9) in Swiss Colony, Inc., v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010).

The Supreme Court held:

> Before utilizing this methodology, however, the commissioner must make a preliminary factual finding that the employee either (1) earns no wages or (2) earns "'less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality.'" King v. City of Mt. Pleasant, 474 N.W.2d 564, 566 (Iowa 1991) (quoting Iowa Code § 85.36(10) (1987) (now § 85.36(9))).

Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 134 (Iowa 2010). The court further said,

> Whether an employee works a forty-hour week is not the sole criterion for determining whether that employee "earns less" than similar laborers in his field, Id. The language in section 85.36(9) distinguishes full-and part-time employees on the basis of weekly earnings, not the number of hours worked per week.

Swiss Colony. Inc., v. Deutmeyer, 789 N.W.2d 129, 135 (Iowa 2010).

In this case, the evidentiary record is void of any information concerning the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality. Furthermore, this is not a situation in which Iowa Code section 85.36(9) would be the easiest or most reasonable subsection to apply. See Carney v. T&C Rodeo Company, Inc., File No. 5054767 (Arb. Dec. Feb. 15, 2017) Based upon the lack of evidence in the record I cannot apply Iowa Code section 85.36(9).

Iowa Code section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. On the date of injury, claimant was working as an hourly employee. The correct section to apply is 85.36(6).

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Iowa Code section 85.36(6). In calculating gross weekly earnings over the previous 13 weeks, weeks should be excluded from the calculation which are not representative of hours typically or customarily worked during a typical or customary full week of work, not whether a particular absence from work was anticipated. Exclusion of weeks during an expected plant shutdown was appropriate. Jacobson Transp. Co. v. Harris, 778 N.W.2d 192 (Iowa 2010); Griffin Pipe Products Co. v. Guarino, 663 N.W.2d 862 (Iowa 2003).

The Iowa Supreme Court provided an in-depth analysis of what qualifies as "customary earnings" in the case of Jacobson Transp. Co. v. Harris, 778 N.W.2d 192 (Iowa 2010). Ascertainment of an employee's customary earnings does not turn on a determination of what earnings are guaranteed or fixed; rather, it asks simply what earnings are usual or typical for that employee [...] An employee need not justify the

weekly variance with a particular explanation. The amount of the variance alone, by the magnitude of its departure from the usual earnings of the employee, may suffice to justify the exclusion of a week's earnings from the weekly rate calculation. (Id.)

After reviewing claimant's wage records, I determined claimant's customary work week schedule consisted of working approximately 86.5 hours per pay period. (Ex. B) Given this finding, I excluded the pay period ending on August 31, 2018, as claimant only worked 7.85 hours. I found the next seven pay periods were representative of claimant's customary work week schedule. (Ex. B, pp. 22-28) This combination of pay periods yields an average weekly wage of $968.92.

Next, the parties disagree over the extent to which Mr. Rainer's Manager Bonus should be included in the computation of claimant's compensation rate. First, it must be determined whether the bonus is regular. Whether a bonus is "regular" is determined on a case-by-case basis and is dependent upon a variety of factors. These factors include how often the bonus is received, how consistently it has been paid to the employee over the course of his or her employment, whether it is subject to a condition precedent, whether it is voluntarily paid, and whether it had vested at the time of the injury. See Noel v. Rolscreen Co., 475 N.W.2d 666 (Iowa 1991) The Iowa Supreme Court has suggested that these factors are neither an exclusive nor exhaustive list. Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 264-65 (Iowa 2012) This agency has previously held that a bonus need not be paid during the 13 calendar weeks prior to an injury in order for it to be included in the AWW calculation. Draayer v. Pella Corp., File No. 5018137 (Remand Dec. 30, 2011) (citing Mayfield v. Pella Corp., File No. 5019317 (Remand June 30, 2009))

Claimant offered no evidence on the bonus other than including it in his calculation. Claimant offered no testimony on this point, and did not address it in his post-hearing brief. There is no evidence whether it is a regular or irregular bonus, how often it has been paid in the past, or how the amount is determined. Claimant did not know how the bonus was calculated; just that he received it for being an assistant manager in the outbound department in 2017. (Hr. Tr., pp. 51-52) There is no evidence whether the bonus is subject to profitability or other factors. Claimant bears the burden of proof to show the bonus should be utilized in the calculation of his rate. He has failed to meet that burden.

Given the parties stipulation as to single status and entitlement to one exemption, average gross weekly earnings of $968.92 per week yields a weekly compensation rate of $620.18 according to the published Workers' Compensation Manual for a date of injury on September 27, 2018. Permanent Partial Disability benefits shall be paid at this rate.

According to the Hearing Report, Mr. Rainer seeks reimbursement for the fees associated with Dr. Taylor's independent medical examination pursuant to Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes

that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

The Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). See Cortez v. Tyson Fresh Meats. Inc., File No. 5044716 (Appeal December 2015). The Commissioner has taken a similar strict interpretation of the pre-requisites set forth in Iowa Code section 85.39. See Reh v. Tyson Foods, Inc., File No. 5053428 (Appeal March 2018).

In this case, no physician specifically evaluated the extent of claimant's permanent disability before Dr. Taylor's IME took place on October 30, 2019. There is no indication claimant sought authorization for an 85.39 examination. At hearing, claimant clarified that he is only seeking the costs associated with Dr. Taylor's report. Nevertheless, for purposes of addressing the issues outlined in the Hearing Report, I find claimant failed to prove entitlement to reimbursement of all fees associated with Dr. Taylor's report pursuant to Iowa Code section 85.39.

Finally, claimant seeks an award of costs. More specifically, claimant seeks the costs of his filing fee and Dr. Taylor's independent medical examination report. Claimant is seeking $125.00 from the employer and $125.00 from the Second Injury Fund for Dr. Taylor's report. According to claimant, the total charge for the examination and report was $500.00. Claimant did not include an itemized bill from Dr. Taylor. Claimant asserts it is reasonable to assume half of Dr. Taylor's fees are attributable to the report. I disagree. Because we do not have an itemized bill from Dr. Taylor, I decline to assess any portion of costs associated with Dr. Taylor's IME against the defendant employer or the Second Injury Fund.[1]

Costs are awarded at the discretion of the agency. Iowa Code section 86.40.

The Second Injury Fund Act does not provide for costs to be paid by the Fund. Iowa Code section 85.64. Additionally, subsection 2 of Iowa Code section 85.66, which codifies the creation of the Fund, specifically states, in pertinent part "... Moneys collected in the second injury fund shall be disbursed only for the purposes stated in this subchapter, and shall not at any time be appropriated or diverted to any other use or purpose." The plain language of Iowa Code section 85.66 does not allow for the assessment of costs against the Fund. Houseman v. Second Injury Fund, File No. 5052139 (Arb. Dec. Aug. 8, 2016): see DART v. Young, 867 N.W.2d 839, at 845 (Iowa 2015) (declaring an agency's authority to tax costs cannot go beyond the scope of the powers delegated in the governing statute).

[1] In any event, it would be difficult to assign any responsibility for Dr. Taylor's IME report to the defendant employer as the IME report only addressed permanent impairment related to the June 24, 2011, injury. In fact, claimant's letter to Dr. Taylor provides, "We already have the treating doctor's rating for the left knee injury and we are in agreement with that rating." (Ex. 2, p. 2)

Claimant brought a successful petition in arbitration. I conclude it is appropriate to assess costs in some amount. Exercising my discretion, I conclude that it is appropriate to assess claimant's filing fee of $100.00 to the employer. No costs will be assessed against the Second Injury Fund.

ORDER

THEREFORE, IT IS ORDERED:

The employer shall pay claimant four and two-fifths (4.4) weeks of permanent partial disability benefits commencing on February 8, 2019.

The employer shall pay accrued weekly benefits in a lump sum together with interest 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 injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

The employer and insurance carrier shall be entitled to a credit for all weekly benefits paid to date.

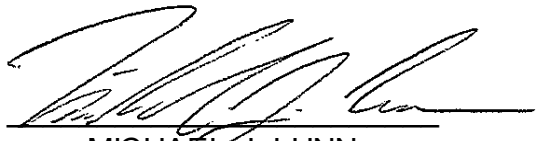
Defendant employer shall reimburse claimant's costs as set forth in this decision.

The employer shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

The Second Injury Fund shall pay claimant fourteen and nine-tenths (14.9) weeks of permanent partial disability benefits commencing on March 15, 2019.

All weekly benefits shall be paid at the rate of six-hundred twenty and 18/100 dollars ($620.18).

Signed and filed this ___8th___ day of December, 2021.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Zeke McCartney (via WCES)

James Peters (via WCES)

Meredith Cooney (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.