

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL HOUSEMAN,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

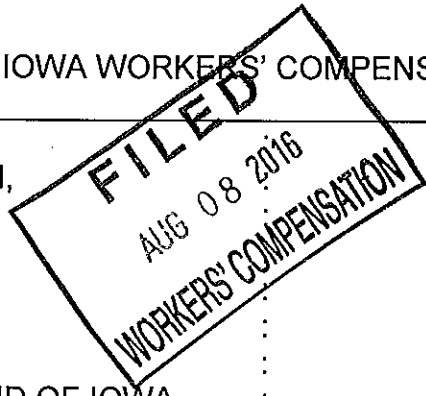
Defendant.,

File No. 5052139

ARBITRATION

DECISION

Head Note Nos.: 2907, 3202, 3203



STATEMENT OF THE CASE

Claimant, Mike Houseman, filed a petition in arbitration seeking workers' compensation benefits from Second Injury Fund of Iowa (Fund) as defendant. This case was heard in Des Moines, Iowa on April 12, 2016 with a final submission date of May 24, 2016.

Prior to hearing, claimant settled his October 27, 2014 claim for a left leg injury with defendant employer, City of Des Moines, in an agreement for settlement. That agreement for settlement was approved on April 14, 2016.

The record in this case consists of claimant's Exhibits 1 through 7, defendant Fund's Exhibits A through H, and the testimony of claimant.

ISSUES

1. The extent of claimant's entitlement to Fund benefits.
2. The extent of the Fund's credit.
3. Costs.

FINDINGS OF FACT

Claimant was 58 years old at the time of hearing. Claimant completed the 9th grade. He does not have a GED.

Claimant has worked as a garbage collector and as a tree trimmer. He worked for a concrete company driving a truck and setting concrete forms. Claimant ran a paver for an asphalt company. He described all of these jobs as very physical positions.

In 1998 claimant began employment with the City of Des Moines. Claimant initially worked for the city as a tree trimmer. He worked in street maintenance, patching potholes in streets. Claimant became a medium equipment operator. This is the job claimant held at the time of hearing. (Exhibit F, pages 51-52)

Claimant's medical history is relevant. In his petition, claimant alleges a first qualifying injury, for the purposes of Fund benefits, of September 10, 2006 to the right upper extremity. In deposition, claimant testified he hit his right arm on a piece of steel while getting out of a truck. (Ex. E, p. 41) There are no medical records indicating claimant injured his right arm while hitting it on a piece of steel. In an independent medical evaluation (IME) report, John Kuhnlein, D.O. noted, after reviewing claimant's medical records, claimant twisted his left wrist while working on barricades on September 10, 2006. (Ex. 3, p. 10)

The record indicates claimant had a left carpal tunnel release on March 19, 2007. He had a right carpal tunnel release on May 7, 2007. (Ex. 3, pp. 10-11) In a February 4, 2008 IME report, Dr. Kuhnlein found claimant had a 3 percent permanent impairment to both the left and right upper extremities for a September 10, 2006 injury date. Dr. Kuhnlein also gave claimant work restrictions. (Ex. 3, p. 15)

Claimant testified Dr. Kuhnlein's work restrictions are not applied with his job at the City of Des Moines. (Ex. D, pp. 32-33) Claimant received permanent partial disability benefits, from the City of Des Moines, based upon a 3 percent rating to both upper extremities. (Ex. E, p. 42; Deposition p. 31)

On June 2, 2011 claimant underwent a right knee surgery performed by Ian Lin, M.D. (Ex. C, p. 29) He later underwent a second right knee surgery, on January 22, 2013, performed by Brian Crites, M.D. (Ex. C, p. 29)

In a May 8, 2015 report, Dr. Crites found claimant had a 2 percent permanent impairment to the right lower extremity as a result of the right knee injury. (Ex. C, pp. 23-24) In a July 30, 2013 IME report, Jacqueline Stoken, D.O., found claimant had a 35 percent permanent impairment to the right lower extremity as a result of his work-related right knee injury. Dr. Stoken restricted claimant from walking on uneven ground and prolonged walking or standing. Claimant testified in deposition he returned to full-duty work following his right knee surgeries. (Ex. E, pp. 43-44; Depo. pp. 37-38)

Claimant had a lower back injury with the City of Des Moines on April 22, 2009. In February of 2010 claimant underwent a lumbar fusion at the L5-S1 levels. Surgery was performed by Thomas Carlstrom, M.D. (Ex. B, p. 10) Claimant was given work restrictions limiting him in lifting, pushing and pulling 30 pounds occasionally, and no use of vibratory equipment. Claimant was returned to work to the City of Des Moines within those restrictions. (Ex. D, pp. 33-34) Claimant settled his April of 2009 back injury case with the City of Des Moines for a 40 percent permanent impairment to the body as a whole. (Ex. B, pp. 3-4)

On October 27, 2014 claimant had a work-related left knee injury. (Ex. 1) On December 16, 2014 claimant underwent left knee surgery with Dr. Crites. (Ex. 2, p. 3) Claimant had no improvement in symptoms from that surgery. On April 6, 2015 claimant underwent a total knee replacement (TKR) on the left. Surgery was performed by William Boulden, M.D. (Ex. 2, pp. 2-3)

On July 28, 2015 Dr. Boulden released claimant to return to work at full duty. The only restrictions given to claimant were that he was to avoid jumping and running. (Ex. H, p. 54) Claimant returned to work as a medium equipment operator with City of Des Moines.

In an August 12, 2015 letter, Dr. Boulden found claimant had a 37 percent permanent impairment to the left lower extremity as a result of the TKR. (Ex. 4)

In a November 24, 2015 IME report, Robin Sassman, M.D. gave her opinions of claimant's condition. Dr. Sassman found claimant had a 50 percent permanent impairment to the left lower extremity. She also limited claimant in sitting, standing and walking occasionally, and to avoid walking on uneven surfaces. (Ex. 2, p. 6) Claimant testified at hearing that the City of Des Moines is unaware of Dr. Sassman's restrictions.

Claimant settled his left knee injury with the City of Des Moines based upon a 43.5 percent permanent impairment to the left lower extremity. (Ex. 6)

In a March 11, 2016 report Lewis Vierling, MS, CRC, gave his opinions of claimant's vocational opportunities. Mr. Vierling opined claimant would be unable to obtain and retain employment in a labor market relating to 100 percent of occupations within his pre-injury job status were claimant not be able to retain employment with the City of Des Moines. Mr. Vierling opined claimant has a severely diminished work capacity given his injuries. (Ex. 5)

In a March 5, 2016 letter, James Wells, Human Resources Director for the City of Des Moines, indicated claimant was restricted from lifting more than 30 pounds from waist to shoulder occasionally and from using vibratory tools. The same restrictions related to claimant's 2009 back injury. (Ex. D, pp. 32-33)

Claimant testified he returned to employment as a medium equipment operator for the City of Des Moines following his TKR. He said the permanent restrictions he has at the time of hearing, were in effect in 2013. Claimant said he works on uneven ground routinely on his job with the City of Des Moines. He said he is not looking for work, and does not plan on looking for a job. Claimant has a commercial driver's license.

Claimant testified he cannot use ladders and cannot kneel or squat. He said he has difficulty walking on uneven surfaces. He said he did not believe he could return to work in any of his prior jobs due to his limitations. Claimant said he still has knee pain, and pain in his right arm. He said he has troubles driving a bulldozer because of the use of pedals.

Claimant testified he has difficulty standing for more than 45 minutes. He said he has difficulty sitting for over an hour. Claimant believes he could walk approximately a mile. Claimant says he has difficulty sleeping at night due to pain from his injuries.

CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to Fund benefits.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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.

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

The 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 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

Claimant was 58 years old at the time of hearing. He does not have a GED. Claimant has worked as a garbage collector and a tree trimmer. He worked for a concrete company driving a truck and setting concrete forms. Claimant ran a paver for an asphalt company. Claimant testified he does not believe he could return to any of these jobs given his limitations.

Claimant has had a number of injuries to his extremities and his lower back. Claimant has been assessed as having a 3 percent permanent impairment to both upper extremities. (Ex. 3, p. 15) He settled for a 25 percent loss to the right lower extremity regarding his April 21, 2011 right knee injury. (Ex. C, pp. 19-33) Claimant settled for a 40 percent loss to the body as a whole for his April 27, 2009 back injury. (Ex. B, pp. 3-4; Ex. E, p. 47) He has settled for a 43.5 percent loss to the left leg regarding his April 27, 2014 injury. (Ex. 2, pp. 3-4; Ex. 6, p. 56)

The only restrictions claimant currently has, at his job as a medium equipment operator with the City of Des Moines, is claimant is restricted from lifting and the use of vibratory tools. This restriction relates only to his lower back injury. (Ex. D, pp. 32-33)

Mr. Vierling opines claimant would be precluded from obtaining employment relating to 100 percent of occupations within his pre-injury job status if he lost his job with the City of Des Moines. (Ex. 5) Mr. Vierling's report is troubling for several reasons. First, I do not know how claimant can be excluded from obtaining 100 percent of occupations, given he was returned to work, following his October of 2014 injury, to the same job he held prior to this October of 2014 injury.

Second, the statement that claimant ". . . has a loss of access to 100 percent of the jobs he was qualified to do prior to his injuries . . ." is unclear. (Ex. 5, p. 26) Does this mean claimant is precluded from all prior jobs he could have done after his September of 2006 upper extremity injuries? Does this opinion include injuries to his back? Or does this opinion include all of claimant's injuries?

Given these concerns, it is found Mr. Vierling's reports regarding his employability are found not convincing.

Claimant has a number of extremity injuries. These include a 3 percent rating bilaterally to the upper extremities, a 25 percent loss to the right lower extremity, and approximately a 43 percent loss to the left leg. Claimant also has a 40 percent loss to the body as a whole due to a back injury. The only restriction given to claimant that applies to his job with the City of Des Moines concerns his lower back injury. Claimant continues to work in the same job he had, at the same pay, as he did before his October of 2014 injury to his leg. When all factors are considered, it is found claimant has a 40 percent loss of earning capacity or industrial disability.

The next issue to be determined is the extent of credit to the Fund. Defendant Fund contends they are due a credit for all of claimant's scheduled member injuries. (Defendant Fund's post-hearing brief, pp. 5-6)

Under prior agency law, this argument might have been true. See Mockenhaupt v. George A. Hormel Co., 89-90, IAWC, 303, 308 (Appeal Decision 1989) (Fund may receive credit for impairment resulting in more than two injuries).

That agency case law was changed in Pace v. State Steel Supply Co., File No. 5025917 (Appeal decision, November 9, 2010). That decision was based upon guidance provided in the Iowa Supreme Court case of Second Injury Fund of Iowa v. Kratzer, 778 N.W.2d 42 (Iowa 2010). As noted in the Pace appeal decision:

The court (in Kratzer) denied the Fund a credit for the claimant's prior unscheduled low back injury and the prior scheduled left leg injury which was also a portion of the 1994 injury. As such, the total credit should be limited to the value of the separate scheduled injuries which comprise the first and second qualifying injuries. To do otherwise would provide the Fund with a credit for loss of use of a scheduled member which plays no role in the combined disability between the two qualifying injuries. Id.

Regarding the first injury, Dr. Kuhnlein found claimant had a 3 percent impairment to both upper extremities. This entitles the Fund to a total of 15 weeks for both upper extremities (250 weeks x 3% x 2)

While the Second Injury Fund of Iowa is not bound by agreements between a claimant and an employer because it was not a party to the agreement, the agreements are binding on the claimant. Northrup v. Tama Meat Packing and the Second Injury Fund of Iowa, File No. 724196 (App. March 19, 1990). Given the settlement agreement, the Fund shall receive a credit of 95.7 weeks for the left leg injury of October 27, 2014 (43.5% x 220 weeks).

Based on the decision in Pace, the Fund is due a total credit of 110.7 weeks (95.7 + 15).

Claimant is due 89.3 weeks of Fund benefits (200 weeks – 110.7 weeks).

The final issue to be determined is costs. Claimant seeks costs from the Fund that include the filing fee, service fee and a fee for a report from Dr. Crites.

The Second Injury Fund Act does not provide for costs to be paid from the Fund, and Iowa Code section 85.66 expressly prohibits expenditures from the Fund for other purposes. Claimant's request for costs, other than the filing fee, is denied. Second Injury Fund v. Greenman, File No. 5003370 (App. October 19, 2004); Second Injury Fund of Iowa v. Greenman, No. 05-0855 (Iowa Court of Appeals, October 25, 2006), unpublished 725 N.W.2d 658 (table).

ORDER

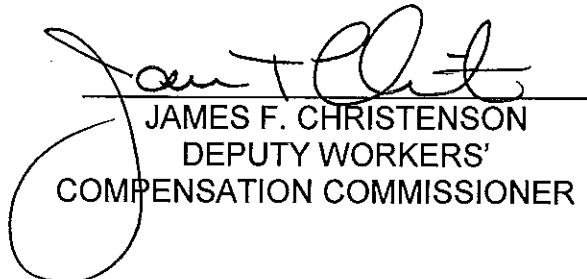
THEREFORE IT IS ORDERED:

That defendant Fund shall pay claimant eighty-nine point three (89.3) weeks of Fund benefits at the rate of six hundred sixty-eight and 07/100 dollars (\$668.07) per week commencing on ninety-five point seven (95.7) weeks after August 13, 2015.

That benefits from the Second Injury Fund shall accrue interest from the date of this decision.

That defendant Fund shall only pay the filing fee as a cost.

Signed and filed this 8th day of August, 2016.


JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

David Lawyer
Attorney at Law
4090 Westown Pkwy., Ste. E
West Des Moines, IA 50266
dmlawyer@me.com

Sarah Brandt
Assistant Attorney General
Department of Justice-Special Litigation
Hoover State Office Building
Des Moines, IA 50319
Sarah.brandt@iowa.gov

JFC/sam

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.