BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LINDA HANNAN,	: FILED	
Claimant,	: FEB 03 2017	File No. 5052402
vs.	: WORKERS COMPENSATION	ARBITRATION
SECOND INJURY FUND OF IOWA,	:	DECISION
Defendant.	:	Head Note Nos.: 1803, 1804, 3200

STATEMENT OF THE CASE

Claimant, Linda Hannan, filed a petition in arbitration seeking workers' compensation benefits from the Second Injury Fund of Iowa (Fund) as defendant. This case was heard in Waterloo, Iowa, and fully submitted on May 23, 2016. The record in this case consists of claimant's Exhibits 1 through 11 and the testimony of claimant. The Fund also relies on claimant's Exhibits 1 through 11 and the testimony of the claimant. Both parties submitted briefs.

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 in either file. The parties are now bound by their stipulations.

The parties at the hearing disputed the commencement date of benefits for Fund liability purposes. Claimant in her brief agrees with the Fund's position on commencement date of benefits and this issue is now a stipulated issue.

Claimant and her employer, Mercy Hospital of Franciscan Sisters, Inc., reached an Agreement for Settlement. The claimant and her employer agreed that she was entitled to 12 percent (26.4 weeks) of permanent partial disability of the left lower extremity commencing on December 11, 2014.

The parties have agreed that claimant has a first and a second qualifying injury for Fund liability purposes. (Transcript page 4)

ISSUES

The extent of claimant's disability.

Whether claimant is an "odd-lot" employee entitled to permanent total disability.

Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record finds that:

Linda Hannan, claimant, was 68 years old at the time of the hearing. Client resides in Oelwein, Iowa. After claimant graduated from high school she obtained a number of certifications in nursing and health care. She obtained her Licensed Practical Nurse certificate in 1973, her RN, Associates Degree in Nursing in 1978, her Instructor License in 1982 and NRP certificate (Neonatal Resuscitation) in 1991. (Exhibit 8, p. 3) Claimant worked for Mercy Hospital in Oelwein (Mercy) from 1966 through 2015. (Ex. 8, p. 4) After 49 years her employment was terminated by Mercy on February 3, 2015 due to her work injury of February 28, 2014. (Ex. 9, p. 2; Ex. 10, p. 5) Claimant also worked as an instructor, teaching clinical and filling part-time at Hawkeye Tech in Waterloo from 1991 through 2011. (Ex. 8, p. 4) Claimant worked full time (24 hours per week) as an instructor for two or three years in the early '90s for Hawkeye Tech. (Tr. pp. 37, 38)

Claimant testified that as a nurse for Mercy she worked 12-hour days. Physically she had to take care of patients which could involve lifting patients, doing treatments, answering call lights, dispensing medications. (Tr. p. 13) Claimant spent most of her time on her feet. (Tr. p. 14)

On February 28, 2014, claimant was caring for a patient at Mercy. Claimant got entangled with a wheelchair and fell on the floor. Claimant was taken to the emergency room at Mercy and then transferred to Sartori Hospital. Claimant described her injury as a crushed femur. (Tr. p. 15) Claimant had surgery on her left leg and then occupational therapy. She had over 50 physical therapy sessions. (Tr. p. 16; Ex. 1, p. 3) Claimant testified that she continued to have pain in her left knee area and a CT scan was ordered. Claimant said that CT scan revealed that her bones were not mending and claimant was put on a bone stimulator. (Tr. p. 16)

Claimant's primary physician for her left leg injury was Jason Stanford, D.O. On June 26, 2014, Dr. Stanford provided restrictions to claimant which allowed her to work sitting down. Mercy was not able to accommodate this restriction. (Tr. p. 17)

Claimant had a functional capacity examination (FCE) performed in February 2015. Claimant testified that she believes her symptoms in her left leg at the time of the FCE were similar as of the day of the arbitration hearing. (Tr. p. 18) Claimant testified she currently has upper muscle pain and pain in the area of where the bolts are attached in her left leg. (Tr. p. 19)

Dr. Stanford released claimant to return to work in December 2014 before the FCE was performed. Claimant testified Dr. Stanford advised claimant to try to see if she could go back to work as an RN without restrictions. (Tr. pp. 20, 21)

Claimant injured her right knee on March 13, 2012 when she fell in a parking lot and injured her right knee. (Tr. p. 22) Claimant had arthroscopic surgery on her right knee, Synvisc injections and then a total knee replacement on June 12, 2013. (Tr. p. 24; Ex. 3, p. 16) Claimant returned to work in September 2013. (Ex. 3, p. 23) Claimant testified she has pain in the muscle around her right knee.

Claimant said her current activity level is very limited. (Ex. 1, p. 7) She has limited her activity and she cannot get up from her hands and knees without help. (Tr. p. 27) She has limited her walking and playing with her grandchildren.

Claimant's position at Mercy was filled while claimant was recovering from her left leg surgery. (Tr. p. 28) Claimant applied for positions with Mercy, Covenant and Sartori — the Wheaton healthcare system. Claimant was not offered any jobs. (Tr. p. 29)

Claimant did not think she could return to her position with Mercy due to the prolonged standing. She also did not believe she could perform the clinical instruction position due to the standing and traveling to different rooms. (Tr. p. 40) Claimant acknowledged that Dr. Stanford released claimant to return to work in December 2014. (Tr. p. 41)

Claimant testified that she did not have computer skills. (Tr. p. 31) She is able to use Facebook. (Tr. p. 44) She has used computers and started to use a computer at Mercy to chart patient records. (Tr. p. 31) She could use the email system at work. (Tr. p. 35)

At one time claimant was the OB manager at Mercy. Claimant would hire and fire staff, performed prenatal education, and delivered babies. (Tr. pp. 39, 40) Claimant would also train staff and physicians on neonatal resuscitation by offering class twice a year. (Tr. p. 41)

Claimant broke her left femur on February 28, 2014 when she tripped at work. She was transferred to Santori hospital and Dr. Stanford performed surgery on her left leg on that date. His postoperative diagnosis was, "Comminuted displaced intraarticular T-type distal femur fracture, left." (Ex. 3, p. 24) On June 24, 2014, Dr. Stanford released claimant to return to work with sit-down work only. (Ex. 3, p. 43) Mercy did not offer her work within this restriction. (Ex. 3, p. 52) A bone stimulator was recommended at this time and claimant started this treatment. (Ex. 3, p. 45) On October 29, 2014, Dr. Stanford recommended claimant return to work 4 hours a day, working 45 minutes and resting ½ hour. (Ex. 3, p. 57) On December 10, 2014, Dr. Stanford released claimant to return to work without restrictions and wrote, "I would return her back to work without restriction." (Ex. 3, p. 59)

On February 26, 2015, claimant underwent a full day FCE. The report stated claimant gave maximum effort. (Ex. 6, p. 1) The FCE report identified claimant's work at Mercy as being in the medium category of work. The FCE found claimant was capable of light work. (Ex. 6, p. 1) Among other restrictions, the FCE recommend lifting

restrictions of occasional lifting — floor to waist 15 pounds, waist to overhead, bilateral 12.5 pounds, waist to shoulder 15 pounds, right and left carry 12.5 pounds, and push/pull 50 pounds. Claimant could sit frequently and occasionally perform stationary stand, forward bend and kneel. (Ex. 6, p. 2)

On March 27, 2015, Mark Taylor, M.D. issued an independent medical examination (IME) report. Dr. Taylor's diagnoses were,

1. Right knee patellar fracture on or about March 13, 2012.
2. Right knee arthroscopy on January 7, 2013.
3. Right total knee arthroplasty on June 12, 2013.
4. Left leg intra-articular T-type distal femur fracture on February 28, 2014.

(Ex. 1, p. 8) He found claimant to be at maximum medical improvement for her left leg injury as of December 10, 2014. (Ex. 1, p. 8) Dr. Taylor provided a 12 percent impairment rating for the left leg injury and 37 percent impairment for the right leg. (Ex. 1. p. 9) Dr. Taylor noted that claimant should limit lifting above 30 pounds and that she be allowed to alternate between walking, standing and sitting as needed for comfort, avoid ladders and modify how she uses stairs. (Ex. 1, p. 10) On July 10, 2015, Dr. Taylor responded to claimant's attorney and reviewed the February 2015 FCE. Dr. Taylor made the following recommendations;

> In light of the FCE results, I would recommend 25 pounds between floor and waist level on a rare basis, and 15 pounds occasionally. The other material handling restrictions noted in the FCE report (page 2) are also reasonable in light of her bilateral knee conditions.
>
> She should alternate sitting, standing, and walking as needed for comfort. I had previously recommended no more than approximately 45-60 minutes up on her feet before having the opportunity to sit down. In light of her bilateral knee conditions, I would generally recommend that she avoid kneeling/crawling. She can squat partway on a rare basis, but would benefit from having something to hold onto to assist. She should avoid ladders. She can climb stairs rarely to occasionally, but may have to take one step at a time and should have minimal to no added weight, if possible.

(Ex. 1, p.14)

I find that the restrictions set forth in Dr. Taylor's July 10, 2015 letter are claimant's work restrictions.

On February 1, 2016, Barbara Laughlin, M.A. prepared an Employability Assessment. (Ex. 2, pp. 1 – 12) Ms. Laughlin evaluated claimant's employability by

evaluating vocational factors as well as reviewing job openings between January 25, 2016 and February 1, 2016 at Covenant Hospital system. (Ex, 2, p. 1) Ms. Laughlin wrote that claimant had limited computer skills and that claimant's work in nursing was done in longhand. (Ex. 2, p. 3) Ms. Laughlin reviewed a number of positions and concluded that claimant's restrictions, travel distance, her education, and training would prevent her from performing the positions. (Ex. 2, pp. 3 – 12) Ms. Laughlin wrote,

> It is my opinion Ms. Hannan is most reasonably reduced to sedentary work, for which she is poorly prepared, lacking office and computer skills. With a need to change position from standing or walking to sitting every 45-60 minutes for comfort, she will have difficulty in locating appropriate work. It is significant and a measure of her level of disability that her employer was unable to offer any significant gainful employment to her and could not accommodate her restrictions. Ms. Hannan states that she would prefer to be working.

(Ex. 2, p. 12)

Claimant has requested costs, including the cost of the report of Ms. Laughlin of $781.00. (Ex. 11)

Claimant is limited to light work. I find that claimant has made a good faith effort to find employment. She was in contact with Mercy as well as the parent organization, Wheaton. Her employer was unable to identify any positions she could perform despite Mercy's policy to find a position with reasonable accommodations. (Ex. 10, pp. 3, 4) She was discouraged when she was unable to be rehired by Mercy in the Wheaton system and is receiving a pension as well as social security retirement.

Claimant worked as an RN and as an instructor of nurses for almost 50 years. The evidence submitted was that RN duty is at the medium level. Claimant cannot work at that level. Claimant's unrebutted testimony is that she cannot perform the work as a RN or instructor.

Claimant has minimal skills with computers but did use drop-down menus in her job with Mercy. However her skills are not enough to be gainfully employed where typing on a computer is a major function of a job.

Dr. Stanford did release claimant without restrictions in December 2014. However that was before the February 2015 valid FCE was performed. Given the right total knee replacement and the surgery and hardware in claimant's left leg, I find that the claimant has restrictions and that Dr. Taylor's restrictions are claimant's restrictions.

Considering her injuries, limitations, age, and transferable skills, I find that claimant has a 100 percent loss of earning capacity.

CONCLUSIONS OF LAW

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).

The parties have stipulated and I find that claimant has a first and second qualifying injury for Fund liability purposes.

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). Permanent total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000).

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

I agree the there are some deficiencies with Ms. Laughlin's report. She wrote that claimant's nursing notes were done in longhand, when claimant testified that Mercy had switched to a computer system that used various dropdown menus and screens for charting. However, claimant's computer skills are very limited.

I do not find the last report of Dr. Stanford, that claimant has no restrictions, convincing. His report was done before the valid FCE. Also Dr. Taylor, an occupational physician, examined claimant and had the opportunity to review the FCE. I find his report and conclusion about claimant's restrictions are convincing.

Claimant has not worked since the date of injury, February 28, 2014. Her age is not a positive factor for employment. Claimant cannot perform her prior work as an RN or instructor. Claimant is not able to perform work based upon her experience, training, intelligence and physical capacity.

Concerning industrial disability, when considering claimant's age, education, her past work history including her lack of work in the area of her post-high school education, the significance of her injury, the impairment rating and restrictions assigned, along with her current condition and all other appropriate factors for determining industrial disability, I find that claimant is permanently and totally disabled.

As I have found claimant totally disabled no analysis as to whether claimant is an odd-lot employee is being made.

The Fund is entitled to a credit of 81 weeks for the first injury and 26.4 weeks for the second injury.

Pursuant to rule 876 IAC 4.33 and in my discretion I find that claimant is entitled to the cost of the vocational report in the amount of $781.00.

ORDER

Defendant Second Injury Fund of Iowa shall pay claimant permanent total disability benefits commencing on January 2, 2017 at the stipulated weekly rate of seven hundred and 22/100 dollars ($700.22) and continuing into the future so long as claimant shall remain totally disabled.

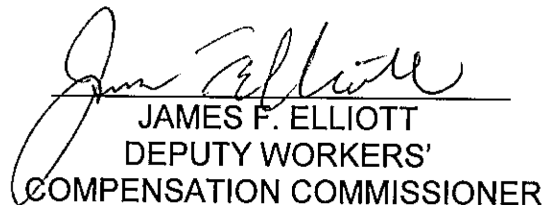
Defendant Second Injury Fund of Iowa shall pay interest on all accrued weekly benefits pursuant to Iowa Code section 85.30. That interest shall accrue pursuant to Iowa Code section 85.30. Interest accrues on unpaid Second Injury Fund benefits from the date of the decision. Second Injury Fund of Iowa v .Braden, 459 N.W.2d 467 (Iowa 1990).

Defendant Second Injury Fund of Iowa shall pay claimant costs of seven hundred eighty-one and 00/100 dollars ($781.00).

Defendant Second Injury Fund of Iowa is entitled to a credit of eighty-one (81) weeks for the first injury and twenty-six point four (26.4) weeks for the second injury.

Defendant Second Injury Fund of Iowa shall file subsequent reports of injury as required by the agency.

Signed and filed this 3rd day of February, 2017.



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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.