BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 29 2019
WORKERS' COMPENSATION

MERIM RAKANOVIC, Claimant, vs. TYSON FOODS, INC., Employer, Self-Insured, and SECOND INJURY FUND OF IOWA Insurance Carrier, Defendants.	File No. 5055533 APPEAL DECISION Head Note Nos: 1804; 3202; 4000
MERIM RAKANOVIC, Claimant, vs. TYSON FOODS, INC., Employer, Self-Insured, Defendant.	File No. 5055534 APPEAL DECISION Head Note Nos: 1801; 1803; 4000; 3202

STATEMENT OF THE CASE

Claimant filed two separate petitions in File Nos. 5055533 and 5055534, which were consolidated and proceeded to hearing on February 1, 2017. The matter was considered fully submitted in front of the deputy workers' compensation commissioner February 17, 2017.

On May 24, 2017, the deputy commissioner issued an arbitration decision. In File No. 5055533, the deputy commissioner found claimant Merim Rakanovic to be permanently and totally disabled. An Order Nunc Pro Tunc entered on June 20, 2017, clarified the award of permanent partial disability (PPD) owed by defendant-employer Tyson Foods, Inc., which was corrected to 41.8 weeks (19 percent of the leg), commencing on August 20, 2018. The arbitration decision found defendant Second Injury Fund of Iowa (the Fund) responsible for payment of permanent total disability

beginning at the conclusion of the employer's PPD obligation. The applicable rate of four hundred fifty-eight and 85/100 dollars ($458.85) per week was stipulated to by the parties. The deputy ordered defendant-employer and the Second Injury Fund to share the costs of the arbitration proceeding equally.

In the same arbitration decision, the deputy commissioner found claimant was not entitled to benefits in File No. 5055534 and ordered that claimant takes nothing and the parties pay their own costs.

On June 8, 2017, the Fund filed its notice of appeal in File No. 5055533. On June 12, 2017, claimant filed his notice of appeal in both files..

The Fund argues on appeal in File No. 5055533 that claimant is not entitled to benefits from the Fund because neither the first nor the second alleged injuries are qualifying injuries. The Fund argues that the first injury extends into the body as a whole and the second injury occurred after the first injury. The Fund further argues that even if the two alleged injuries are qualifying injuries, claimant is not permanently and totally disabled as a result of the two injuries. The Fund also argues that the applicable credit, commencement date of PTD payments, and the obligation to pay costs were found in error.

Claimant argues on appeal in File No. 5055533, as follows: claimant's entitlement to PPD benefits owed by the employer should be 22 percent, rather than 19 percent; the deputy commissioner's award of permanent total disability should be upheld; and the assessment of costs to be shared between the defendants should be upheld. In File No. 5055534, claimant argues he is entitled to healing period (HP) benefits, PPD benefits, and reimbursement/payment of medical expenses. Claimant also argues for an award of penalty benefits related to the employer's failure to pay healing period benefits for the period of December 3, 2015, through January 8, 2016.

Defendant-employer did not appeal the deputy commissioner's decision, but argues on appeal in File No. 5055533 that claimant's injury is limited to the right leg and does not extend into claimant's body as a whole.

In File No. 5055534, defendant-employer argues that the deputy commissioner's determination that the low back injury was a temporary aggravation with maximum medical improvement (MMI) being reached on October 9, 2015, should be upheld and that claimant is not entitled to HP, PPD, penalty benefits, or reimbursement of medical expenses for the low back claim. Defendant-employer essentially argues that the arbitration decision should be upheld in its entirety.

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

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties. The findings of the deputy commissioner as set out in the May 24, 2017, arbitration decision are affirmed in part and modified in part with the following additional findings, conclusions and analysis:

ISSUES

File No. 5055533 - Date of Injury: December 30, 2014

1) Whether claimant sustained qualifying first and second injuries entitling him to receive benefits from the Fund and, if so, the extent of permanent partial disability attributable to the employer and the extent of industrial disability attributable to the Fund, if any.

2) The applicable credit and commencement date of benefits from the Fund, if any.

3) Costs.

File No. 5055534 - Date of Injury: October 8, 2015

1) Whether claimant is entitled to receive healing period benefits from December 3, 2015, through January 8, 2016.

2) Whether the stipulated injury was the cause of any permanent partial disability and, if so, the extent thereof.

3) Whether claimant is entitled to payment of medical expenses itemized in Exhibit 20.

4) Whether claimant is entitled to receive penalty benefits for denial of healing period benefits from December 3, 2015, through January 8, 2016.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

File No. 5055533 - Date of Injury: December 30, 2014

On December 30, 2014, claimant, who was 50 years old at the time of the hearing, was working as a mule driver, when his machine slid into a conveyor resulting in a crush injury to his right lower extremity. (Exhibt A, page 23) The parties stipulated that this injury arose out of and in the course of claimant's employment. (Hearing Report)

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The

extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

First Injury - Left Lower Extremity

The Fund argues that the first injury of July 2010 is not a qualifying first injury, because it actually occurred after the December 30, 2014, injury.

Claimant alleges he sustained a first injury to his left lower extremity in July 2010 as a result of a fall at home. Following this incident, claimant was diagnosed with a "Fracture subluxation of the tarsal metatarsal joint," and a "Lis Franc ligament injury is suspected." (Ex. 2, p. 1) In December, 2010, the diagnosis was stated as a "Lisfranc's injury, left foot." (Ex. 3, p. 3)

Claimant was seen by Thomas Gorsche, M.D., orthopedic surgeon, who recommended a fusion surgery, which claimant declined at that time. (Ex. 3, pp. 3-4) Claimant did not receive additional formal treatment for the left foot injury until 2016.

The Fund argues that the return to medical care for the left foot/leg in January 2016 created a new injury date, such that the injury actually occurred after the December 30, 2014, right lower extremity injury and is therefore not a qualifying first injury. The Fund relies on Dr. Gorsche stating that the left foot did "not bother him that much" on December 20, 2010. (Ex. 3, p. 4) The Fund also argues claimant continued in his job as a mule driver without issue and was not assigned permanent restrictions or a permanent impairment rating from Dr. Gorsche prior to the second injury on December 30, 2014. However, it does not appear Dr. Gorsche was asked to give such opinions and it is not surprising Dr. Gorsche would not do so given the fact that this 2010 injury was not a work injury and occurred at home. Further, it is clear that in 2010 objective testing demonstrated the need for a fusion surgery.

On December 20, 2010, Dr. Gorsche, did opine on the prognosis of claimant when he said "he will probably need a fusion." (Ex. 3, p. 3)

Dr. Gorsche also stated:

> I do not think that this can be repaired at this time. I did offer him and talked to him about going to Iowa City. He states at this time there is no way he can undergo any surgery for this and it does not bother him that much. I have told him the natural history of this with time he will develop arthritis, and it will probably necessitate surgery. At this point, we are going to have him get an off-the-shelf longitudinal arch support. This was explained to him. I think this will give him some relief. I will see him again in the future when his symptoms warrant.

(Ex. 3, pp. 3-4)

Clearly, Dr. Gorche anticipated claimant would develop arthritis as his condition deteriorated in the future and he would need surgery. As it turned out his words were prophetic because claimant did indeed develop arthritis and had increasing pain such that he required surgery in 2016.

Although claimant never returned to Dr. Gorsche for his left lower extremity, his testimony was consistent with Dr. Gorsche's prediction. Claimant testified that his left foot condition worsened with time. He would take pain medication and rest his foot after work to deal with the pain. (Hearing Transcript p. 49) The deputy coommissioner found claimant testified credibly concerning his ongoing symptoms and self-treatment for his left foot injury. The deputy commissioner was in a unique position to observe claimant in person at the time of the hearing and to make credibility assessments. The deputy coommissioner's credibility finding is accepted and relied upon by the undersigned in this matter.

On January 4, 2016, claimant was seen by his primary care provider, Vinko Bogdanic, M.D., who recorded that claimant:

> had [a] left Lisfranc fracture on the left foot 5 years ago and at that time was told that he would need a surgery and at this point given his opposite ankle fracture with surgery and difficulties with walking he is off work now willing to go through surgery to fix this problem so he can go to work hopefully in the future.

(Ex. 5, p. 12)

Dr. Bogdanic referred claimant to Arnold Delbridge,M.D., orthopedic surgeon, whom claimant saw on January 14, 2016. (Ex. 12, p. 3) Dr. Delbridge stated claimant's left foot had the appearance of a Lisfranc fracture and x-rays confirmed a minimal displacement. (Ex. 12, p. 3) Dr. Delbridge recommended an MRI of the left foot "to determine how badly that foot is compromised." (Ex. 12, p. 3) Dr. Delbridge stated on February 19, 2016, that claimant had an "old partial Lisfranc situation" in his left foot, which would be addressed with surgery of a limited fusion. (Ex. 12, p. 6) Dr. Delbridge also noted arthritis of claimant's left navicular bone between the cuneiform and also the

cuneiform and the metatarsal. (Ex. 12, p. 5) The surgery was performed on February 22, 2016. (Ex. 4, p. 15)

I find it significant that Dr. Bogdanic and Dr. Delbridge both refer to the original Lisfranc injury, which indicates a continuation of the 2010 injury, not a new injury in 2016 when claimant finally received treatment.

I affirm the deputy's finding that claimant delayed the recommended surgery on his left foot from 2010 until 2016 when the pain became too significant to continue to tolerate it.

I further affirm the deputy's finding that the first injury to the left foot/leg occurred in 2010 and was a first qualifying injury for purposes of Fund benefits, and did not occur after the December 30, 2014, injury.

Second Injury - Right Lower Extremity

Concerning the second injury, the parties stipulated that claimant sustained a work injury on December 30, 2014, involving the right lower extremity.

The Fund argues that the December 30, 2014, injury to the right lower extremity extends into claimant's body as a whole by inclusion of a mental injury and is not limited to assessment of permanent impairment as a scheduled member, but should be assessed for industrial disability.

Claimant and defendant-employer argue that the December 30, 2014, injury is limited to the right leg only and is therefore a qualifying scheduled member for purposes of benefits from the Fund.

Section 85.64 governs 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.

Therefore, a finding that the December 30, 2014, injury involves claimant's body as a whole would make it a non-qualifying injury for purposes of Fund benefits and it would prevent the Fund's responsibility in this case.

Dr. Gorsche, the treating surgeon for the December 30, 2014, injury, assigned 19 percent permanent partial disability for the right lower extremity injury based on loss of range of motion and reduced sensation utilizing Tables 17-11 and 17-37 of the AMA Guides to the Evaluation or Permanent Impairment, Fifth Edition (AMA Guides). (Ex. 3, p. 27) Dr. Delbridge, a treating physician, agreed with Dr. Gorsche's assessment of 19 percent permanent impairment of the right lower extremity. (Ex. 12, p. 22). Based on

those opinions, the deputy commissioner awarded claimant 19 percent permanent partial disability of the right lower extremity, which entitles claimant to 41.8 weeks of PPD benefits.

In support of their argument that the right leg injury extends into claimant's body as a whole through a mental injury, the Fund points out that while recovering from his injury post-surgery, claimant requested a sedative from Dr. Gorsche because he reported going "stir crazy." (Ex. 3, p. 7) Dr. Gorsche did not prescribe a sedative and instead suggested claimant be given a "scooter to get out of the house, either that or [claimant should] take up reading books." (Ex. 3, p. 7)

On February 18, 2015, claimant was sent by defendant-employer to their on-site physician services and was seen by Robert Gordon, M.D. for "situational adjustment issues." (Ex. 7, p. 1) Claimant reported "overall improvement" in his right leg post-surgery. (Ex. 7, p. 1) However, claimant also reported he was "somewhat disappointed that he has not been able to get out of his house more than he has since his surgery," and he "has not worked at Tyson since his incident." (Ex. 7, p. 1) He was wearing a walking boot, and can leave his house as he pleases, but he reported having nowhere to go. Claimant reported "that he has had depression for quite some time." (Ex. 7, p. 1) He had been treated by Dr. Zdilar for depression prior to the work injury and has tried different medications with limited success. (Ex. 7, pp 1-2) Dr. Gordon recorded that "[claimant] was involved in the Bosnian war," and that he has "had issues to some extent with depression and anxiety since the Bosnian War." (Ex. 7, p. 2) Dr. Gordon recommended that claimant follow-up with his psychiatrist to address his "longstanding history of reported depression," which "is not due to his situational adjustment issue after the tibial fracture." (Ex. 7, p. 3)

Claimant's experiences in the war included his description of being in a "concentration camp for 10 days" and having "nightmares and flashbacks." (Ex. 14, pp. 1, 3) The deputy commissioner found claimant's mental health condition to be a pre-existing condition that developed during his time in the Bosnian War. Further the deputy commissioner found there is no mental health expert or any other expert witness who connects claimant's mental condition to his work injury or any resulting disability that impacts claimant's ability to work. Even Dr. Bansal, claimant's independent medical evaluator did not attempt to connect claimant's mental condition to his work injury. Also Dr. Zdilar opined on February 3, 2016, that claimant had no work restrictions due to any claimed mental injury. (Ex. 14, p. 11)

Defendant-employer points out in its appeal brief that Dr. Zdilar, claimant's regular mental health provider has not causally related claimant's longstanding mental health issues to his employment at defendant-employer, and claimant testified he had no appreciable change in his mental health treatment after the December 30, 2014, work injury. (Tr. p. 77)

I affirm the deputy commissioner's finding that claimant's stipulated work injury, which occurred on December 30, 2014, is limited to his right lower extremity and does not extend into claimant's body as a whole, and I affirm the deputy commmissioner's finding that the December 30, 2014, work injury did not aggravate claimant's pre-existing mental condition.

Considering the extent of entitlement for permanent partial disability benefits for the right leg, claimant argues on appeal that he is entitled to 22 percent permanent partial disability of the right lower extremity based on the opinion of Sunil Bansal, M.D. Dr. Bansal based his opinion on loss of range of motion and sensory loss in the right lower extremity. (Ex. 15, pp. 22-23)

When viewing the expert opinions, I find Dr. Gorsche and Dr. Delbridge had the opportunity to see claimant over a period of several visits adding greater context to their assessment of permanent impairment, compared to that of Dr. Bansal. Also Dr. Gorsche was the treating surgeon for claimant's right leg injury and had the unique opportunity to observe the injury in its original state, which he described as an "Open distal tibial fracture secondary to crush injury," combined with his operative and follow-up observations. (Ex. 4, p. 11)

I affirm the deputy's finding that claimant sustained 19 percent permanent impairment of his right lower extremity, which is 41.8 weeks (220 weeks multiplied by 19 percent = 41.8 weeks). Iowa Code section 85.34(2)(o)

I affirm the deputy commissioner's conclusion that claimant is entitled to second Injury Fund benefits as a result of his first and second injuries.

Extent of Disability

Considering the extent of industrial disability benefits owed by the Fund, the deputy commissioner found the combined effect of the first and second injuries in this case rendered claimant permanently and totally disabled.

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

Claimant and defendant-employer argue that the deputy commissioner's decision should be affirmed.

The Fund argues claimant failed to show any industrial disability from the 2010 first injury to his left foot/leg. The Fund argues claimant returned to work after the first injury and continued in his job as a mule driver, which requires long periods of standing.

(Ex. D, p. 2) This argument by the Fund is similar to its argument that claimant's injury date should be 2016 and not 2010, wherein the argument was made that no disability existed for the left foot prior to the occurrence of the second injury on December 30, 2014. That argument was rejected above and is rejected here for the same reasons. As stated above, I have accepted and affirmed the deputy commissioner's findings concerning claimant's ongoing symptoms with his left foot/leg injury after 2010.

The Fund makes the additional argument that claimant's disability is more significantly impacted by his claimed back injury. The Fund argues Dr. Gordon, Dr. Gorsche and Dr. Delbridge did not assign any restrictions for claimant's lower extremities. However, it appears Dr. Gordon also specifically released claimant concerning his back with no restrictions and neither Dr. Gorsche nor Dr. Delbdrige were asked to opine on the issue of permanent restrictions or permanent impairment concerning claimant's back condition. However, both Dr. Gorsche and Dr. Delbridge indicated claimant sustained permanent impairment for the right leg. Also, on December 3, 2015, Dr. Bogdanic noted claimant's left foot Lisfranc injury was still symptomatic and needed to be "addressed by an orthopedic surgeon." (Ex. 5, p. 12)

On August 19, 2016, claimant underwent an independent medical examination (IME) with Sunil Bansal, M.D. (Ex. 15, p. 1) Dr. Bansal opined claimant sustained permanent impairment of eleven percent of the left lower extremity and 22 percent of the right lower extremity. (Ex. 15, p. 23) Dr. Bansal also imposed restrictions. He assigned a restriction of "no lifting over 5 pounds occasionally." (Ex. 15, p. 24) Dr. Bansal stated this restriction was assigned because, "Given his bilateral feet condition, he does not have the stability or pivot strength to lift more on a practical basis." (Ex. 15, p. 24) Dr. Bansal goes on to assign other restrictions including standing as tolerated, but not for more than 15 minutes and walking as tolerated, but not for more than 15 minutes with a crutch/cane, and that claimant should continue to use the crutch/cane to prevent falling.

It is significant that the restrictions on lifting, standing and walking, which are substantial, are related to claimant's bilateral feet/leg issues.

Considering industrial disability because 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, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and

potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

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).

I find claimant's age, limited education, limited work experience, difficulties with the English language, combined with his significant work restrictions and functional impairment support the deputy commissioner's finding that claimant is permanently and totally disabled as a result of his left and right foot/leg injuries. I also find claimant's ongoing conditions of pain, numbness and swelling and inability to stand or walk more

than short distances along with his testimony that the surgery did not improve the condition of his left foot all support the deputy commissioner's conclusion. (Tr. p. 30) In addition, claimant continued to see Dr. Delbridge monthly for his left foot and continued to be prescribed oxycodone at the time of the hearing. (Tr. p. 50)

I affirm the deputy's conclusion that claimant is permanently and totally disabled as a result of his 2010 left foot/leg and December 30, 2014 right foot/leg injury.

The applicable credit and commencement date of Second Injury Fund benefits

The Fund argues the deputy incorrectly calculated the credit applicable to the Fund's obligation to pay permanent partial disability and the commencement date of benefits.

The deputy commissioner, through an Order Nunc Pro Tunc issued June 20, 2017, clarified that defendant-employer's obligation for payment of permanent partial disability was 41.8 weeks (19 percent of the right lower extremity multiplied by 220 weeks = 41.8)

The deputy commissioner then ordered that the Fund's obligation to pay permanent total disability benefits shall commence at the conclusion of the permanency benefits owed to claimant from the employer for the December 30, 2014 injury.

The Fund argues that when a claimant is found to be permanently and totally disabled, the Fund is given a credit for the both the first and second scheduled member disabilities and permanent total disability benefits do not commence until the conclusion of both scheduled member losses has expired.

The Fund relies on Buser v. Second Injury Fund, 2012 WL 12960656, File No. 5021259 (App. Dec., July 18, 2012), and Warner v. The Scotts Miracle-Grow Co., 2013 WL 5572739, File No. 5041291 (Oct. 4, 2013) in support of their argument.

Claimant does not appear to argue this point in his appeal brief or reply brief.

The parties stipulated that the commencement date for any permanent partial disability awarded is August 20, 2015. (Hearing Report) The Fund argues that its obligation to commence permanent total disability payments is November 25, 2016, which is 66 weeks after August 20, 2015. The Fund calculates this by adding the impairment for both the first injury and the second injuries. The deputy commissioner found claimant sustained eleven percent permanent impairment for the first injury, which is 24.2 weeks (eleven percent of 220 weeks = 24.2 weeks). The second injury resulted in an award of 19 percent permanent impairment, which is 41.8 weeks (19 percent of 220 weeks = 41.8 weeks). Therefore the Fund asserts a credit of 66 weeks, eleven percent or 24.2 weeks plus second injury, 19 percent or 41.8 weeks = 66 weeks)

I find the Fund's credit calculation is correct and the commencement date for payment of benefits owed by the Fund is November 25, 2016, or 66 weeks after the stipulated commencement date of August 20, 2015.

I modify the arbitration decision given the parties stipulation of the commencement date for benefits on August 20, 2015, and the Fund's entitlement to a credit of 66 weeks. Therefore, the Fund's obligation to commence permanent total disability payments shall begin on November 25, 2016.

Costs

The final issue for determination in this matter is costs. The Fund makes multiple arguments on this issue.

I conclude that the Second Injury Compensation 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, is therefore, 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).

I modify the arbitration decision and award costs in File No. 5055533 against defendant-employer and not to be shared by the Fund.

File No. 5055534 - Date of Injury: October 8, 2015

This file involves a claim for benefits concerning a stipulated back injury which occurred on October 8, 2015, when claimant had an increase in back pain when he attempted to move a pallet. Claimant had a history of back pain prior to this date.

The deputy commissioner found, based on the opinions of Dr. Gorsche and Dr. Delbridge, that clamiant's back injury did not result in permanent disability and found Dr. Bansal's opinion concerning causation less persuasive because he failed to provide a detailed causation explanation, like Dr. Gorsche and Dr. Delbridge. The deputy commissioner found claimant's back condition was a temporary aggravation and that Dr. Gorsche and Dr. Delbridge opined claimant was at MMI on October 9, 2015. The deputy concluded claimant's medical treatment after October 9, 2015, was not related to the work injury and claimant was not entitled to any benefits in this file and ordered each party to pay their own costs.

Claimant argues he is entitled to healing period benefits from December 3, 2015, the day claimant went off work, until January 8, 2016, the date Dr. Bansal placed claimant at MMI. Only Dr. Bansal assigned permanent impairment or restrictions for claimant's back condition and Dr. Bansal's opinion concerning the back was given less

weight by the deputy than that of Dr. Gorsche and Dr. Delbridge. Claimant also argues for permanent partial disability benefits, medical expenses and penalty benefits.

I find the deputy commissioner provided sufficient analysis raised in the arbitration proceeding concerning claimant's back injury and I affirm the deputy commissioner's findings of facts and conclusions of law pertaining to those issues in their entirety.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on May 24, 2017, is affirmed in part and is modified in part:

File No. 5055533 - Date of Injury: December 30, 2014

Defendant Tyson Food, shall pay claimant forty one point eight (41.8) weeks of permanent partial disability benefits at the stipulated weekly rate of four hundred fifty-eight and 85/100 dollars ($458.85) commencing on the stipulated date of August 20, 2015.

Defendant Second Injury Fund of Iowa shall pay claimant permanent total disability benefits pursuant to the Second Injury Compensation Act at the stipulated weekly rate of four hundred fifty-eight and 85/100 dollars ($458.85) and those benefits shall commence on November 25, 2016, which is sixty six (66) weeks after August 20, 2015.

Defendant Tyson Foods shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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 Tech., File No. 5054686 (App. Apr. 24, 2018). Interest accrues on unpaid Second Injury Fund benefits from the date of this appeal decision.

Defendants are to be given credit for all benefits previously paid.

Pursuant to rule 876 IAC 4.33, defendant Tyson Foods shall pay claimant's costs of the arbitration proceeding as itemized in Exhibit 19 except for the charges of Dr. Bansal, and claimant and defendant Tyson Foods shall split the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants Tyson Foods and Second Injury Fund of Iowa shall file subsequent reports of injury as required by this agency.

File No. 5055533 - Date of Injury: December 30, 2014

Claimant shall take nothing from these proceedings.

Pursuant to rule 876 IAC 4.33, the parties shall pay their own the costs of the arbitration proceeding and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendant Tyson Foods of Iowa shall file subsequent reports of injury as required by this agency.

Signed and filed on this 29th day of March, 2019.

Joseph S. Cortese II

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WORKERS' COMPENSATION
COMMISSIONER

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