BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MONTE JIMMERSON, Claimant, vs. ULTIMATE AUTOMOTIVE SERVICE CENTER, Employer, TECHNOLOGY INSURANCE CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	FILE NO. 1630457.01 A R B I T R A T I O N D E C I S I O N HEAD NOTES: 1702, 1803.1

STATEMENT OF THE CASE

Claimant, Monte Jimmerson, filed a petition in arbitration seeking workers' compensation benefits from Ultimate Automotive Service Center, employer, Technology Insurance Company, insurance carrier, and the Second Injury Fund of Iowa (Fund), all as defendants, as a result of a stipulated injury sustained on March 18, 2017. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on April 18, 2023, via videoconference using Zoom. The record in this case consists of joint exhibits 1 through 16, claimant's exhibits 1 through 5, defendant-employer and insurance carrier's exhibits A through H, defendant-Fund's exhibits AA through CC, and the testimony of the claimant. The parties submitted post-hearing briefs; the matter being fully submitted on May 25, 2023.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant's injury is a scheduled member disability to the right leg or an industrial disability;
2. The extent of permanent disability;
3. Any apportionment pursuant to Iowa Code section 85.34(7);

4. Whether claimant is entitled to Second Injury Fund benefits and if so, the amount of such benefits; and
5. Specific taxation of costs.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record and his deposition testimony. His demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 52 years of age at the time of hearing. He resides in Van Meter, Iowa with his fiancé and minor son. (Claimant's testimony) Claimant attended high school through the 10th grade and subsequently obtained his GED. He joined the Army National Guard and earned a welder's certification. (Claimant's testimony; CE2, p. 23) In addition to his time in the National Guard, claimant's work history consists of landscaping labor, janitorial, automotive technician, and mechanic. (CE2, pp. 27-29; DEC, pp. 9-11) The majority of his work history, dating to 1994, was with defendant-employer, a family owned and operated business. Claimant drove tow trucks, maintained vehicles, and assisted customers. In his role, claimant earned $1,625.00 biweekly, plus family health coverage. (CE2, p. 29; DEE, pp. 22-29; Claimant's testimony)

In December 2005, claimant underwent an MRI and was diagnosed with a medial meniscus tear of the left knee. (JE1, p. 2) He underwent surgical repair with Jon Gehrke, M.D., that same month and was ultimately returned to work without restrictions in March 2006. (JE1, pp. 3-4, 7) In November 2011, claimant returned to Dr. Gehrke, who opined claimant had suffered a bucket handle tear of the left medial meniscus. He performed a left knee arthroscopy with debridement of the medial meniscal tear. In December 2011, claimant was released from care to progressive activities. (JE1, pp. 15-16, 18) Claimant testified his left knee continues to ache and pop post-treatment. (Claimant's testimony)

On February 24, 2014, claimant suffered a right shoulder injury while in the employ of defendant-employer. (DEAA, p. 4) Claimant underwent right rotator cuff repair with Brian Crites, M.D. (Claimant's testimony; JE2, p. 28) Following treatment, claimant underwent a functional capacity evaluation (FCE) of his right shoulder. The results found claimant's capabilities largely consistent with medium work, including front carry

up to 30 pounds occasionally and 40 pounds rarely. Claimant's waist to crown lifting was limited to light category work, 15 pounds occasionally and 20 pounds rarely. (JE2, pp. 20-22) Dr. Crites opined claimant achieved maximum medical improvement as of April 11, 2015. Dr. Crites opined claimant sustained permanent impairment of 21 percent upper extremity or 13 percent body as a whole. Following review of the FCE, Dr. Crites imposed permanent restrictions limiting claimant to medium category work, with no repetitive overheard activities and no lifting greater than 15 pounds above waist level. (JE3, pp. 29-30)

Claimant returned to work at defendant-employer, but did not complete the same duties as pre-injury. Rather, his duties revolved around driving, repairing, and maintaining the tow truck. Claimant explained he experienced difficulty performing heavy engine and mechanic work, as well as troubles with some overhead work. Beyond these difficulties, claimant's job duties remained the same. His salary was unchanged post-injury. (Claimant's testimony; DECC, Depo. Tr. pp. 30-31)

Claimant's right shoulder injury became the subject of a workers' compensation arbitration hearing. The presiding deputy commissioner found claimant sustained a 30 percent industrial disability as a result of the injury, entitling claimant to 150 weeks of permanent partial disability benefits. (DEAA, pp. 4, 7-8) On appeal, the commissioner affirmed the award of 30 percent industrial disability and ordered the defendants to pay claimant 150 weeks of permanent partial disability benefits. (DEBB, pp. 11-12)

On March 18, 2017, claimant was unloading a towed vehicle from a truck when the vehicle became free and began rolling. Claimant became pinned between this vehicle and another vehicle at the location. He was able to free himself from between the vehicles, but unable to walk. He ultimately got the attention of an individual, who called for assistance. (Claimant's testimony) Claimant was transported to the hospital via ambulance. (JE 5, pp. 60-61)

Claimant was admitted for treatment. While hospitalized, claimant was diagnosed with: crushing injury of the right lower leg; rupture of the right gastrocnemius muscle; rupture of the peroneus muscle; and traumatic compartment syndrome of the right lower extremity. (JE4, p. 33) Claimant underwent a fasciotomy on March 18, 2017. He then underwent wound exploration with evaluation and resection of necrotic tissue on March 20, March 21, March 22, March 24, and March 27, 2017. On March 30, 2017, claimant underwent skin grafting, using tissue harvested from his thigh. The placed wound vac was removed on April 4, 2017. Claimant was discharged home by Richard Sidwell. M.D., on April 5, 2017, with home health assistance for wound care and outpatient physical therapy. (JE4, pp. 34, 37-47)

Claimant continued to follow-up with Dr. Sidwell for his right leg injury. On May 22, 2017, Dr. Sidwell noted progress in claimant's physical abilities, but continued difficulties with dependent edema. While Dr. Sidwell recommended continued use of compression stockings, he noted incomplete relief and referred claimant for evaluation in the lymphedema clinic. (JE7, p. 74)

Claimant began a course of care in the lymphedema clinic on June 6, 2017. (JE8, p. 75) He was treated with manual lymphatic drainage and lymphedema bandages of the right lower leg. (JE8, p. 78) Once swelling was reduced, claimant was transitioned to a long-term compression program, including a custom knee-high compression garment with toe caps for daytime use and compression velcro devices for nighttime use. The daytime garments were designed to allow continued use of an ankle brace to address claimant's foot drop. Kari Selvert, OTR/L, noted claimant would require such devices for a lifetime to control the edema. (JE8, p. 85) Claimant was ultimately discharged from the lymphedema clinic on September 28, 2017. (JE8, p. 89)

After the right leg injury, claimant remained off work for approximately six months. Thereafter, claimant returned to work at defendant-employer, primarily as a tow truck driver. He oversaw repairs and maintenance, but did not physically perform such tasks. Claimant's salary remained the same. (Claimant's testimony; DECC, Depo. Tr. p. 32)

At the request of defendant-insurance carrier, claimant was evaluated by physical medicine and rehabilitation physician, Kurt Smith, D.O., for an independent medical examination on November 30, 2017. Dr. Smith authored a report containing his findings and opinions dated December 13, 2017. (JE10, p. 116) Dr. Smith performed a records review, interview, and physical examination. (JE10, pp. 116-119) Thereafter, he assessed: right foot drop; pain of the right lower leg; and history of skin graft. (JE10, p. 119) Dr. Smith opined claimant continued to experience right lower extremity weakness, sensory impairment, pain, and swelling in the right lower extremity. He recommended ongoing pain management medications, continued compression devices, and use of the AFO brace to compensate for dorsiflexion weakness and the demands of ambulation. Dr. Smith recommended work restrictions of occasional walking and standing, which he anticipated would continue into the indefinite future. (JE 10, p. 120)

Dr. Smith opined claimant had achieved maximum medical improvement (MMI) and had sustained permanent impairment as a result of the right lower extremity injury. Dr. Smith opined claimant suffered with a Class 2 impairment attributable to edema with continued need of compression devices, warranting an impairment of 10 percent lower extremity or 4 percent whole person. Due to skin grafting with impaired sensation, Dr. Smith rated 2 percent whole person. He opined claimant sustained a 15 percent whole person impairment due to his altered gait with continued use of an AFO brace. He opined claimant sustained a 4 percent lower extremity or 2 percent whole person impairment due to sensory impairment. Finally, Dr. Smith opined a 30 percent lower extremity or 12 percent whole person impairment due to impaired motor function. In total, Dr. Smith found a combined permanent impairment of 31 percent whole person. (JE10, p. 121) In response to a request for further clarification, Dr. Smith subsequently revised his report to reflect the following ratable impairments: 4 percent lower extremity or 10 percent whole person for ongoing edema; 2 percent whole person for skin grafting with ongoing impaired sensation; 15 percent whole person for altered gait; and 30 percent lower extremity or 13 percent whole person for peroneal nerve injury. Utilizing

these percentages, Dr. Smith opined a combined 30 percent whole person impairment. (JE10, p. 122)

Claimant's routine follow-up care included medication management, bracing, and compression stockings. Such care was managed by Chandra Brown, ARNP. (JE9, pp. 94, 101)

At the request of defendant-insurance carrier, physical medicine and rehabilitation physician, Sankar Pemmaraju, D.O., performed an impairment rating review. Dr. Pemmaraju reviewed claimant's medical records and authored a report containing his opinions dated March 6, 2019. (JE11, pp. 124-125) Dr. Pemmaraju opined claimant suffered: 10 percent lower extremity or 4 percent whole person impairment attributable to peripheral vascular disease; 3 percent right lower extremity for sensory deficit of the common peroneal nerve and 29 percent right lower extremity for motor deficits of the common peroneal nerve, for a combined 31 percent lower extremity or 12 percent whole person due to peripheral nerve deficits; and 2 percent whole person for skin grafting with impaired sensation. He opined Dr. Smith incorrectly included a rating for altered gait, as such a rating method cannot be combined with another lower extremity rating methodology under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He therefore excluded any consideration of altered gait impairment from his ultimate determination of 18 percent whole person impairment. (JE11, pp. 125-127)

At the referral of his counsel, claimant underwent an independent medical examination (IME) with board certified occupational medicine physician, Sunil Bansal, M.D. Dr. Bansal examined claimant on July 8, 2019 and issued a report containing his findings and opinions on October 14, 2019. (CE 1, pp. 1, 11) Dr. Bansal performed a medical records review, subjective interview, and physical examination. (CE1, pp. 2-8) Dr. Bansal diagnosed: right lower extremity crush injury with compartment syndrome, status post fasciotomy and multiple wound debridements and explorations; right lower leg lymphedema; and right lower leg neuropathy. He opined claimant developed chronic lymphedema and lower leg neuropathy, with elements of a neuropathic foot, as sequela of the original injury. (CE1, pp. 8-9) Dr. Bansal expressed agreement with Dr. Sidwell's MMI date of May 22, 2017, but recommended pain management of the lower leg neuropathy and routine use of compression stockings to manage lymphedema. (CE1, p. 10) Dr. Bansal recommended permanent restrictions of: no prolonged standing or walking greater than 30 minutes; avoidance of multiple stairs; and avoidance of walking on uneven ground. (CE1, p. 11)

Dr. Bansal opined claimant suffered permanent impairment as a result of the work injury. As a result of lymphedema, Dr. Bansal opined claimant sustained a Class 2 impairment due to continued usage of compression stockings, warranting a 20 percent lower extremity or 8 percent whole person impairment. Due to common peroneal nerve dysfunction, including motor and sensory loss, Dr. Bansal opined a total 37 percent lower extremity or 15 percent whole person impairment. Dr. Bansal also opined claimant sustained a 7 percent lower extremity or 3 percent whole person impairment attributable

to extensive scarring and skin grafting with sensitivity to temperature. On these bases, Dr. Bansal found a combined impairment of 54 percent lower extremity or 22 percent whole person. While acknowledging claimant also suffered from gait derangement and utilized an AFO brace, which corresponded to a 15 percent whole person impairment, Dr. Bansal opined such an impairment was not properly combined with peripheral nerve impairments per the AMA Guides. Accordingly, he excluded any impairment attributable to gait derangement from his ratable impairment calculation. (CE1, pp. 10-11)

Claimant's follow-up care became managed by Eric Donels, D.O. in April 2020. At that time, Dr. Donels continued to manage claimant's chronic pain medications and referred claimant to physical medicine and rehabilitation to determine further treatment options. (JE12, p. 131) Todd Troll, M.D. noted an exquisitely tender superficial nerve and recommended evaluation for potential skin graft site revision. Claimant was referred to a plastic surgeon to address superficial nerve pain; a fasciotomy and nerve relocation was ultimately performed on September 25, 2020. (JE12, p. 135; JE13, p. 157; JE15, pp. 174-176)

Meanwhile, in May 2020, claimant presented to Dr. Donels with reports of acute onset low back pain. Dr. Donels ordered an MRI of the lumbar spine. (JE12, pp. 132, 134) The MRI revealed mild multilevel degeneration of the lumbar spine, without significant central or foraminal stenosis. (JE14, p. 161) On August 13, 2020, claimant underwent lumbar medial branch nerve blocks bilaterally at L4-5 and L5-S1. (JE16, pp. 179-181) He underwent a lumbar radiofrequency ablation on January 6, 2021. (JE16, p. 185) Claimant's pain management provider, Jason Ostrander, ARNP opined claimant's lower back complaints were not caused or materially aggravated by the right leg injury. (DEB, pp. 3-4) Dr. Donels similarly opined claimant did not develop a permanent lower back condition as a result of the right leg injury or any altered gait. (DEA, pp. 1-2)

In early February 2020, defendant-employer was divided into two pieces by claimant's father. Defendant-employer remained in the control of claimant's brother, while claimant was given the dealer trade portion of the company. Dealer trades involved transporting vehicles between auto dealer locations. While the portions of the company operated under the same umbrella for a time, ultimately a formal split occurred. (Claimant's testimony; DECC, Depo Tr. p. 33) In March 2021, claimant ceased work at defendant-employer entirely and began his own transport business, Jimmerson Transport. In this role, he performed dealer trades and earned $2.50 per mile. During this time frame, there was a slowdown of dealer trades due to the COVID pandemic. Claimant's truck also broke down. He ultimately closed Jimmerson Transport in June 2022. (Claimant's testimony; DED, p. 16; DEF, pp. 30-33; DECC, Depo. Tr. pp. 36-38)

Claimant unsuccessfully sought work as a delivery driver at Amazon. He also applied for work as a semi-truck driver with multiple companies. (Claimant's testimony; CE3, p. 32; DED, p. 17) Claimant was hired as an over-the-road truck driver by C.R. England and began the required truck driving school in September 2022. Following completion of the required schooling, claimant was hired as an over-the-road driver; he

remained so employed on the date of hearing. In his truck driver role, claimant drives no-touch freight and earns 45 cents per mile. Claimant's earnings have varied from $700.00 to $1,600.00 per week. He estimated his gross earnings are comparable to those at defendant-employer, but noted he is required to pay a portion of his health insurance premium. (Claimant's testimony; DECC, Depo. Tr. pp. 42-44) He does not labor under any formal, physician-imposed permanent restrictions, but claimant testified he self-limits consistent with Dr. Bansal's recommended restrictions. (DECC, Depo. Tr. p. 65) Claimant testified he does not believe himself capable of performing loading or unloading of freight, as he fears reinjury. (Claimant's testimony; DECC, Depo. Tr. pp. 83-84) His CDL license prohibits claimant from operating a manual transmission. Claimant explained his right leg prevents him from completing the frequent shifting required to operate a manual transmission. (Claimant's testimony; DECC, Depo. Tr. pp. 98-99) Claimant testified he enjoys his work and does not intend to look elsewhere, but does not like being away from home for long periods of time. (Claimant's testimony)

On March 12, 2023, claimant participated in a phone conversation with Dr. Bansal. Thereafter, Dr. Bansal authored a report dated March 17, 2023 and titled "Independent Medical Examination." (CE1, p. 12) In connection with the evaluation, Dr. Bansal reviewed medical records regarding claimant's left knee condition, dated from 2005 through 2011. (CE1, pp. 13-14) Following records review and interview, Dr. Bansal issued responses to questions posed by claimant's counsel. Thereby, Dr. Bansal elaborated on his prior diagnosis of right lower leg lymphedema, describing lymphedema as a collection of lymph fluid which results from blockage of the lymphatic system. He described the lymphatic system as a body-wide system of vessels, tissues, and organs that carry protein-rich, infection-fighting lymph fluid. (CE1, p. 18) With respect to claimant's prior left knee condition, Dr. Bansal diagnosed a 2005 left knee bucket handle medial meniscus tear, status post repair, as well as a 2011 left knee bucket handle medial meniscus tear, status post arthroscopy and debridement. He opined claimant sustained a permanent impairment of 2 percent lower extremity due to the surgical repair. Dr. Bansal also recommended permanent restrictions of no frequent kneeling or squatting secondary to the left knee injury. (CE1, p. 18)

Claimant testified he continues to experience symptoms he relates to the 2017 work injury. He related suffering with constant pain, including nerve pain and a burning sensation on the top of his foot. He also experiences continued swelling and sensitivity of his right leg. Claimant indicated his right calf lacks muscle and is approximately one-half the size it had been pre-injury. He is unable to lift his right foot in the air and cannot lift his toes. (Claimant's testimony) Claimant has continued to follow up with Dr. Donels for care, including ankle-foot orthotics, steroid injection of the right knee, and medication management. (JE12, pp. 142, 145-146) Claimant continues to utilize prescription medication in treatment of his right leg injury, including Gabapentin, Diclofenac, and Duloxetine. (CE3, p. 35) Claimant does not consistently wear his prescribed compression stockings, as he finds them uncomfortably tight. On occasion, he will wear over-the-counter compression socks if he experiences significant swelling. He testified he experiences increased swelling with use of the leg while driving, at which time he

develops stiffness, soreness, and decreased mobility. (Claimant's testimony; DECC, Depo. Tr. p. 88) He is unable to wear an ankle brace while operating his semi due to the angle of the gas pedal, but he wears the device when walking distances or mowing the yard. Claimant testified he walks with a limp, trips frequently, and balances on his left foot when standing. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant's injury is a scheduled member disability to the right leg or an industrial disability.

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. 6.904(3).

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)-(u) or for loss of earning capacity under section 85.34(2)(v). 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).

An injury to a scheduled member may, because of aftereffects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a)-(u) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

In the instant case, there is no dispute that claimant's right leg injury resulted in development of lymphedema. All three opining physicians opined claimant sustained permanent impairment attributable to lymphedema and resulting edema. All three opining physicians also computed claimant's disability on a body-as-a-whole basis. The threshold question, therefore, is whether claimant's lymphedema diagnosis transforms claimant's claim from a scheduled member injury to the right leg into an unscheduled, industrial disability. Claimant and the Fund argue claimant's development of lymphedema results in an unscheduled, whole person disability. Defendant-employer and insurance carrier argue claimant's disability is properly limited to the right lower extremity, claiming the disability is confined to the lower extremity.

The question of whether lymphedema constitutes an injury to the body as a whole was recently addressed by this agency in Delaney v. Second Injury Fund of Iowa, File No. 19005645.04 (Arb. Dec. Feb. 11, 2022). In Delaney, the presiding deputy commissioner concluded:

> This agency has held that lymphedema constitutes an injury to the vascular system, and thus is an injury to the body as a whole. See Derby v. The Dexter Co., File Nos. 1111978 et al. (App., December 3, 1999); Barker v. Cedar Valley Corp., File No. 1153401 (Arb. April 13, 2000); see also Anderson v. Broadlawns Medical Center & Second Injury Fund of Iowa, File No. 5064991 (Arb., December 16, 2019). The Iowa Supreme Court has considered vascular injuries to be whole body injuries that are to be compensated industrially. See Blacksmith v. All-American, Inc., 290 N.W.2d 248 (Iowa 1980); Architectural Wall systems v. Towers, 854 N.W.2d 74 (Table) (Iowa Ct. App. 2014). This agency has held that vascular injuries, even those located in extremities are body as a whole injuries. See Raymond v. Menard, Inc., File No. 5039009 (App., December 18, 2013); Briggs v. Second Injury Fund, File No. 5024615 (App., December 4, 2009); Andrade v. IBP, Inc., File No. 5013872 (App., August 29, 2006).
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> Based on the above findings of fact, I conclude Ms. Delaney's right lower leg condition constitutes lymphedema. Additionally, based on the expert opinions in this case, I conclude her lymphedema is causally connected to her right knee replacement surgery and thus is a sequela of her March 12, 2019 work injury. Based on the opinions of Dr. Manshadi, I conclude that Ms. Delaney's lymphedema resulted in permanent impairment to her body as a whole. Dr. Manshadi assigned 3 percent permanent impairment to the whole body due to peripheral vascular disease. As such, I conclude that the March 12, 2019 work injury is not limited to a scheduled member.

(Delaney, Arb. Dec. p. 4)

The deputy's analysis and decision was affirmed in its entirety by the commissioner in an appeal decision dated July 21, 2022. On further review, the district court affirmed the commissioner's decision on January 31, 2023, finding the commissioner's determination that Delaney's lymphedema extended into the body as a whole was supported by substantial evidence. (Ruling on Petition for Judicial Review (Jan. 31, 2023, p. 10)).

Claimant suffers with a condition that this agency has found can form the basis for a determination of a body as a whole injury. In claimant's instance, all opining physicians have opined claimant sustained permanent impairment as a result of the injury and permanent impairment directly attributable to lymphedema. Each physician computed claimant's impairment on a body-as-a-whole basis. Multiple providers have opined claimant's lymphedema condition requires lifetime care in order to control and limit the negative impact upon claimant's life and livelihood. While claimant may not be faithfully abiding by the recommendations for use of compression devices, his condition

has not abated and continues to impact his ability to perform work duties and activities of daily living. Additionally, evidence has been presented which supports a determination that claimant suffers with gait derangement; when ratable, the impairment is based upon a whole person impairment. Given agency precedent and the facts of claimant's claim, I find claimant's injury extends beyond his right leg and into the body as a whole.

The next issue for determination is the extent of permanent disability. Having determined claimant's injury extends into the body as a whole, his disability is computed industrially.

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 Ry. Co. of Iowa, 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 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.

Claimant suffered a significant and debilitating disability as a result of the March 18, 2017 work injury. The injury has left him with decreased abilities in his right leg, as well as pain and edema which further impact his activities. These permanent conditions require ongoing medical care, include medication management, compression garments, and assistive ankle braces/orthotics. The three opining physicians provided consistent ratings of claimant's permanent physical impairments, once Dr. Smith's inappropriate inclusion of gait derangement is excluded from the computation. These ratings vary from 18 to 22 percent whole person, attributable to edema, nerve dysfunction, and skin grafting. I therefore find all the ratings persuasive, again following exclusion of gait derangement impairment from Dr. Smith's calculation. While claimant does not follow specific permanent restrictions, he does self-limit consistent with restrictions recommended by Dr. Bansal and has a limitation on his CDL license attributable to his right ankle limitations. Claimant is precluded from engaging in some of the tasks he performed pre-injury at defendant-employer, but has proven capable of continued

professional driving and the ability to be retrained as an over-the-road driver. He has shown motivation to continued employment and his current earnings are comparable to his pre-injury earnings at defendant-employer.

Following consideration of the above and all other relevant factors of industrial disability, it is determined claimant has suffered a 60 percent industrial disability as a result of the work injury of March 18, 2017. This award entitles claimant to 300 weeks of permanent partial disability benefits (60 percent x 500 weeks = 300 weeks), commencing on the stipulated date of September 3, 2017. The parties stipulated claimant's gross average weekly wage was $750.00 and claimant was married and entitled to 5 exemptions at the time of the work injury. The proper rate of compensation is therefore, $513.66.

The next issue for determination is whether apportionment pursuant to Iowa Code section 85.34(7) is appropriate.

Pursuant to section 85.34(7), the employer is not liable for compensating an employee's disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated. It is undisputed that defendant-employer previously paid claimant 150 weeks of permanent partial disability benefits, representing an award of 30 percent industrial disability sustained as a result of a February 14, 2014 work injury. There is no evidence that claimant's earnings were diminished following the 2014 work injury, such as would justify modification of an award of credit. Accordingly, defendant-employer and defendant-insurance carrier shall receive credit for 150 weeks of permanent partial disability benefits previously paid as a result of the February 14, 2014 work injury against the award of 300 weeks of permanent partial disability benefits given in this matter.

The next issue for determination is whether claimant is entitled to Second Injury Fund benefits and if so, the amount of such benefits.

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

Having determined claimant's March 18, 2017 injury is not limited to a scheduled member injury, claimant has failed to establish a second qualifying loss for purposes of seeking benefits from the Second Injury Fund of Iowa. Having failed to establish the existence of a second qualifying loss, claimant shall take nothing from the Fund in these proceedings.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: filing fee ($103.00); service fee ($21.99); and March 2023 medical report of Dr. Bansal ($1,478.00). (CE4) The costs of filing fee ($103.00) and service fee ($21.99) are allowable costs and are taxed to defendant-employer and insurance carrier. The medical report cost of Dr. Bansal was incurred primarily to address claimant's prior left knee injuries, necessary components of claimant's claim for benefits against the Fund, not defendant-employer or insurance carrier. Therefore, I decline to tax the cost of said report to defendant-employer and insurance carrier. This agency does not have authority to tax costs against the Fund; accordingly, the cost of Dr. Bansal's report is not taxed to the Fund. The costs of $103.00 filing fee and $21.99 service fees are taxed against defendant-employer and insurance carrier.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendant-employer and defendant-insurance carrier shall pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits commencing September 3, 2017 at the weekly rate of five hundred thirteen and 66/100 dollars ($513.66).

Defendant-employer and defendant-insurance carrier shall pay accrued weekly benefits in a lump sum.

Defendant-employer and defendant-insurance carrier shall receive credit for benefits paid.

Defendant-employer and defendant-insurance carrier shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants 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 Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendant-employer and defendant-insurance carrier shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Claimant shall take nothing from the Second Injury Fund of Iowa.

Costs are taxed to defendant-employer and defendant-insurance carrier pursuant to 876 IAC 4.33, as set forth *supra*.

Signed and filed this 18th day of October, 2023.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Matthew Milligan (via WCES)

Andrew Tice (via WCES)

Jonathan Bergman (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.