BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES HARRELL, Claimant, vs. DENVER FINDLEY & SONS, INC., Employer, and WEST BEND MUTUAL INS. CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 5066742 A P P E A L D E C I S I O N Head Notes: 1402.20; 1402.30; 1802; 1803; 1803.1; 1804; 2907; 3000; 3202

Defendant Second Injury Fund of Iowa (the Fund) appeals from an arbitration decision filed on January 6, 2020. Defendants, Denver Findley & Sons, Inc., employer, and its insurer, West Bend Mutual Insurance Company, cross-appeal. Claimant, James Harrell, also cross-appeals. The case was heard on September 24, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on November 1, 2019.

In the arbitration decision, the deputy commissioner found claimant met his burden of proof to establish he sustained a left foot injury which arose out of and in the course of his employment with defendant-employer on or about April 23, 2018. The deputy commissioner found claimant proved entitlement to temporary disability benefits. More specifically, the deputy commissioner found claimant is entitled to receive healing period benefits from June 1, 2018, through May 29, 2019. The deputy commissioner also found claimant proved entitlement to permanent disability benefits. The deputy commissioner limited claimant's entitlement to permanent disability benefits to the scheduled member. The deputy commissioner awarded claimant scheduled member functional permanent impairment of fifty-seven percent of the left foot, which entitles claimant to receive 85.5 weeks of permanent partial disability (PPD) benefits, commencing on May 30, 2019.

The deputy commissioner found claimant proved he sustained a qualifying first injury to his right eye, which entitles claimant to receive Fund benefits for the combined effects of that injury and the work injury of April 23, 2018. Given that the deputy commissioner found claimant proved entitlement to benefits from the Fund for a first qualifying injury, the deputy commissioner did not reach a finding as to whether claimant also carried his burden of proof that he sustained a qualifying injury to his left leg following a left total knee replacement.

The deputy commissioner found claimant sustained scheduled member permanent impairment of one-hundred percent of the right eye, which is 140 weeks of PPD benefits, for his first qualifying injury. For the combined effect of the two injuries, the deputy commissioner found the Fund responsible for payment of permanent total disability benefits after applying the appropriate credits for the first injury, and the April 23, 2018, work injury.

The deputy commissioner found the Fund is entitled to receive a credit of 140 weeks for the first qualifying injury, and 85.5 weeks for the second qualifying injury, for a total credit of 225.5 weeks. The deputy commissioner found the Fund is not entitled to receive an additional requested credit of 81.4 weeks, for 37 percent permanent disability of claimant's left leg which predated the April 23, 2018, work injury.

The deputy commissioner found claimant's weekly benefit rate for this injury to be $313.07, pursuant to Iowa Code section 85.36(7). Lastly, the deputy commissioner ordered defendants employer and insurer to pay claimant costs of the arbitration proceeding in the amount of $1,922.79.

On appeal, the Fund asserts the deputy commissioner erred in finding claimant proved his injury arose out of and in the course of his employment. The Fund asserts the deputy commissioner erred in finding the April 23, 2018, work injury resulted in a loss, or loss of use, of the left foot as opposed to a loss of the left leg. The Fund further asserts the deputy commissioner erred in calculating claimant's weekly workers' compensation rate by including pay periods subsequent to the date of injury. Lastly, the Fund asserts the deputy commissioner erred in finding the Fund is not entitled to a credit for claimant's pre-existing left knee condition.

Defendants employer and insurer join in the Fund's assertion that the deputy commissioner erred in finding claimant's injury arose out of and in the course of his employment. On cross appeal, defendants employer and insurer assert the deputy commissioner erred in calculating claimant's workers' compensation rate pursuant to Iowa Code section 85.36(7) as opposed to Iowa Code section 85.36(9).

Claimant asserts on appeal that the deputy commissioner correctly found claimant proved his injury arose out of and in the course of his employment with defendant-employer. Claimant further asserts the deputy commissioner correctly found claimant's weekly benefit rate to be $313.07, pursuant to Iowa Code section 85.36(7). Claimant also asserts the deputy commissioner correctly found the Fund is not entitled

to a credit for claimant's pre-existing left lower extremity condition. On cross-appeal, claimant asserts the deputy commissioner erred in finding April 23, 2018, to be the proper date of injury. Claimant further asserts the deputy commissioner erred in not allowing claimant to introduce new evidence in his post-hearing brief. Lastly, claimant asserts the deputy commissioner erred in finding claimant's phantom pain is limited to the left foot. Instead, claimant asserts entitlement to industrial disability benefits from defendants employer and insurer.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, those portions of the proposed arbitration decision filed on January 6, 2020, relating to issues properly raised on intra-agency appeal are affirmed in part, modified in part, and reversed in part. I provide the following additional analysis:

I affirm the deputy commissioner's finding that claimant carried his burden of proof to establish his injury arose out of and in the course of his employment with defendant-employer.

Like the deputy commissioner, I find John Kuhnlein, D.O.'s expert opinion to be the most persuasive. Claimant's credible testimony and the expert opinions of Sunil Bansal, M.D., supplement the opinions of Dr. Kuhnlein. It is relatively immaterial that Dr. Bansal concluded claimant's injury stemmed from the hot and sweaty conditions of claimant's employment while Dr. Kuhnlein felt the repetitive action of double clutching to shift gears was what ultimately led to claimant's injury. Both experts provide plausible explanations as to how occupational factors led to claimant's injury. It is also immaterial that claimant developed blisters on both his left and right foot. The right foot was exposed to the same hot and sweaty conditions as the left foot. However, the right foot was not exposed to the repetitive action of double clutching to shift gears. Again, Dr. Bansal's opinion provides that claimant's work conditions led to the development of blisters, which would explain why claimant developed blisters on both the left and right foot. Dr. Kuhnlein's opinion provides the repetitive act of double clutching to shift gears caused the blisters that then developed gangrene and required amputation, which would explain why the condition of claimant's left foot was significantly worse than the condition of claimant's right foot. Lastly, defendants' argument that claimant did not depress the clutch with the side of his left foot is oversimplified and not persuasive. Such an argument focuses solely on direct contact, while ignoring other contributing factors. For these reasons, I affirm the deputy commissioner's finding that claimant carried his burden of proof to establish his injury arose out of and in the course of his employment with defendant-employer.

I affirm the deputy commissioner's finding that April 23, 2018, is the proper date of injury. Claimant asserts the proper date of injury is actually June 1, 2018, the date when claimant underwent his first amputation surgery. Claimant asserts this is the first date when claimant knew his injury was serious and would have a permanent adverse impact on his employment or employability. Claimant's argument on appeal conflates the cumulative injury rule with the discovery rule. On or about April 23, 2018, claimant

was aware he suffered from a condition or injury, and that the condition or injury was caused by his employment. Moreover, given the 2017 amendments to Iowa Code section 85.23, I find claimant knew or should have known his injury or condition was work-related on April 23, 2018. As such, I affirm the deputy commissioner's finding that April 23, 2018, is the proper date of injury.

I affirm the deputy commissioner's finding that there was insufficient evidence regarding whether claimant was earning less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which claimant was injured, as required by section 85.36(9). Thus, I affirm the deputy commissioner's determination that section 85.36(7) is the appropriate code section to apply when calculating claimant's weekly benefit rate. However, I modify the deputy commissioner's finding that claimant's asserted rate calculation is accurate for the April 23, 2018, date of injury. Claimant's rate calculation included pay periods subsequent to April 23, 2018. After reviewing the wage records contained in the evidentiary record, I accept the Fund's updated rate calculation, which excludes the pay periods ending on April 27, 2018, May 4, 2018, and May 11, 2018. As such, I find claimant's weekly workers' compensation benefit rate is $242.71.

I affirm the deputy commissioner's finding that because the newspaper article attached to claimant's post-hearing brief was not offered into evidence at the arbitration hearing, it cannot be considered at the arbitration level or on appeal. It is well-established that no evidence shall be taken after a hearing. See 876 IAC 4.31; see also Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994) ("New evidence is not allowed to be introduced in a brief.")

As part of his cross-appeal, claimant asserts the deputy commissioner erred in finding that the phantom pain claimant experiences is confined to the left foot and does not extend claimant's injury to the body as a whole. In this regard, claimant asserts he is entitled to industrial disability benefits from the defendants employer and insurer for the April 23, 2018, work injury.

Respectfully, I disagree with the deputy commissioner's initial finding that claimant met his burden of proof to establish phantom pain as an element of his April 23, 2018, work injury. The only medical record which notes claimant was experiencing phantom pain is the IME report of Sunil Bansal, M.D. (Ex. 3, p. 17) Moreover, despite the fact claimant reported phantom pain to Dr. Bansal, Dr. Bansal did not make a diagnosis of phantom pain, nor did he assign any impairment as a result of claimant's alleged phantom pain. As the deputy commissioner properly noted, there is no evidence in the record that claimant ever received treatment for his alleged phantom pain symptoms. Given the lack of evidence in the record, I reverse the deputy commissioner's finding that claimant met his burden of proof to establish phantom pain as a component of his left foot injury.

I affirm the deputy commissioner's finding that claimant's injury is limited to the left foot. I affirm the deputy commissioner's finding that claimant sustained 57 percent

functional impairment of the left foot as a result of the work injury. I further find it was proper and appropriate for the deputy commissioner to convert Dr. Bansal's impairment rating from the left lower extremity to the left foot.

Converting impairment ratings is a necessary step in determining an injured workers' entitlement to disability benefits. The Guides are, in a sense, "neutral." The Guides provide a method for converting impairment but do not define when conversion is proper. It is the Iowa Workers' Compensation Act that dictates when an impairment rating is to be converted pursuant to the schedule of benefits. For instance, an impairment rating to a finger can be converted to an impairment rating to the hand, upper extremity, and body as a whole. In such a hypothetical, simply because the claimant produces an impairment rating to the upper extremity does not mean that the injury is to the claimant's arm. This agency makes a finding of fact classifying the injury as an injury to the finger, hand, arm, or body as a whole, and then the impairment rating is converted to meet such a finding. In this case, the deputy commissioner found, and I affirm, that claimant's injury is limited to the foot. The deputy commissioner did not err by converting the assigned impairment rating.

The deputy commissioner's finding that claimant experiences phantom pain no doubt played a role in his ultimate finding that claimant is permanently and totally disabled. As such, an analysis of claimant's extent of disability is warranted.

Generally speaking, portions of the proposed agency decision pertaining to issues not raised on appeal are affirmed and are adopted as a part of the appeal decision. While the Fund did not specifically assert in its appeal brief that the deputy commissioner erred in finding claimant to be permanently and totally disabled, the issue was raised before the presiding deputy commissioner, and the Fund appealed "the Arbitration Decision and all adverse findings of fact and conclusions of law therein." (Second Injury Fund Notice of Appeal) Moreover, the extent of claimant's disability is necessarily incident to, or dependent upon, an issue that was expressly raised on appeal. 876 IAC 4.28(7)

Iowa Administrative Code 876-4.28(7) provides, in part:

> An issue raised on appeal is decided de novo and the scope of the issue is viewed broadly. If the ruling from which the appeal was taken made a choice between alternative findings of fact, conclusions of law, theories of recovery or defenses and the alternative selected in the ruling is challenged as an issue on appeal, de novo review includes reconsideration of all alternatives that were available to the deputy.

With the following additional analysis, I modify the deputy commissioner's finding that claimant is permanently and totally disabled as a result of the combined effects of the 1953 right eye injury and the April 23, 2018, work injury.

Disabilities when there is Fund liability are analyzed as to the body as a whole, industrial disabilities. 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 1979).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 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, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 110 N.W.2d 660 (1961).

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, 258 N.W. 899.

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).

Claimant was 71 years old at the time of the hearing. (Hearing Transcript, page 15) He is a high school graduate. (Hr. Tr., p. 16) The majority of his employment history consists of work as a truck driver. (See Exhibit D, p. 21) He is limited to driving in-state as he is not able to pass a DOT physical due to the blindness in his right eye. (Hr. Tr., pp. 32-33) He is limited in terms of mobility due to his use of a cane. (Hr. Tr., pp. 35-36) There is evidence that claimant's ability to balance is impacted by both his left knee condition and the partial amputation of his left foot. (See Hr. Tr., pp. 68-69) Claimant is able to complete activities of daily living, however, he requires assistance putting a sock on his left foot. (Hr. Tr., p. 36) Claimant is able to complete household chores, including sweeping, mopping, and mowing his yard. (See Ex. E, Depo. pp. 72-

73; Hr. Tr., p. 37) He currently receives Social Security Retirement benefits. (Hr. Tr., p. 31)

In finding that claimant is permanently and totally disabled, the deputy commissioner relied upon the fact claimant is no longer capable of working as a truck driver. While claimant's ability to engage in employment for which the employee is best suited is a factor to be considered when analyzing industrial disability, it is not the only factor. Moreover, claimant still possesses the ability to drive. At hearing, claimant testified he recently drove approximately 330 or 340 miles to Bennett Springs, Missouri. Claimant does not, however, possess the ability to drive vehicles with manual transmissions. At hearing, claimant testified he could return to truck driving if the truck had an automatic transmission. (Hr. Tr., p. 38) Claimant further testified he is aware of some companies that have trucks with automatic transmissions. (Id.)

As part of his industrial disability analysis, the deputy commissioner determined claimant has shown motivation for work. A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Rus v. Bradley Puhrmann, File No. 5037928 (App. December 16, 2014); Copeland v. Boone Book and Bible Store, File No. 1059319 (App. November 6, 1997).

In finding claimant has shown motivation to work, it appears the deputy commissioner relied upon the fact claimant returned to the competitive workforce in approximately 2014 even though he was receiving Social Security Disability and Social Security Retirement benefits. While I have little doubt claimant is a hardworking individual, and he has previously shown motivation to return to work in approximately 2014, it cannot be said claimant demonstrated motivation to return to work after sustaining the April 23, 2018, work injury. Claimant did not conduct an adequate job search. Claimant made no effort to seek suitable employment following the April 23, 2018, work injury. (See Hr. Tr., p. 65) Claimant testified he has no intention of looking for work in the future unless he is somehow able to return to work for defendant-employer. (Hr. Tr., p. 65) Claimant considers himself to be retired. (Hr. Tr., pp. 65-66) Lastly, claimant offered no vocational expert opinion to establish he is unemployable in the competitive labor market.

While I agree with the deputy commissioner that claimant has sustained significant permanent disability as a result of the combination of his two scheduled member injuries, I do not find claimant is permanently and totally disabled. After considering all factors relevant to an industrial disability analysis, I find claimant has sustained 75 percent industrial disability, which entitles claimant to receive 375 weeks of PPD benefits. The Fund's liability commences following expiration of the liability of defendants employer and insurer, or 85.5 weeks after May 30, 2019. As such, the Fund's liability commences on January 18, 2021.

On appeal, the Fund asserts the deputy commissioner erred in finding the Fund is not entitled to a credit for claimant's pre-existing left leg condition. Instead, the deputy commissioner found the Fund is entitled to receive 225.5 weeks of credit for the

first and second qualifying injuries. The Fund asserts entitlement to 309.4 weeks of credit for three scheduled member losses. The evidentiary record establishes claimant sustained 57 percent impairment of the left foot and 100 percent impairment of the right eye. The evidentiary record is void of any impairment ratings attributable to the left total knee replacement claimant received in 2006.

The Fund requests that it be given an additional credit of 37 percent of claimant's left lower extremity, or 81.4 weeks, for claimant's left leg disability which existed prior to the April 23, 2018, work injury.

Claimant asserts on appeal that the Fund should not be allowed to receive a credit for claimant's left leg condition which existed prior to April 23, 2018, without a supporting medical opinion because the amount of impairment would be speculative. This same question was recently addressed by the undersigned in Meader v. Second Injury Fund of Iowa, File No. 5057325 (App. Nov. 25, 2019).

Under the AMA Guides, Fifth Edition, Table 17-33, p. 547, a total knee replacement yields a compulsory rating of at least 37 percent of the lower extremity. Some impairment ratings are assigned on the basis of a diagnosis as opposed to findings on physical examination. Total knee replacements happen to fall into this category. In this case, the Fund is requesting a credit for claimant's pre-April 23, 2018, left leg disability in the lowest possible amount, which appears to be 37 percent of the left lower extremity, pursuant to the compulsory, minimum rating of the AMA Guides, Fifth Edition. The Fund is not asking this agency to evaluate and determine the actual permanent impairment attributable to the pre-existing left lower extremity condition.

This Agency has previously held that a medical impairment rating is not an absolute legal requirement when establishing qualifying first injuries. See George v. Second Injury Fund of Iowa, File No. 5001966 (App. Nov. 1, 2004) This Agency has also held it would create a double standard to allow a claimant to establish a qualifying first injury without an impairment rating, while simultaneously not allowing the Fund to assert a credit for a qualifying injury without an impairment rating. Meader v. Second Injury Fund of Iowa, File No. 5057325 (App. Nov. 25, 2019)

Iowa Code section 85.34(2)(x) provides:

> In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

I respectfully disagree with the deputy commissioner's determination that lay opinion or the use of agency expertise is required to apply the minimum, compulsory impairment rating that can be assigned as the result of a surgical procedure for the purposes of a credit.

In this case, it is undisputed claimant underwent a left total knee replacement prior to his April 23, 2018, work injury. The AMA Guides, Fifth Edition provides a minimum, compulsory impairment rating of 37 percent for a total knee replacement. It is unnecessary for a deputy commissioner to utilize lay testimony or agency expertise in this scenario. The deputy commissioner is not acting as a medical professional and determining the appropriate impairment rating to assign based on any physical findings. Rather, the deputy commissioner is utilizing the AMA Guides, Fifth Edition to locate a minimum, compulsory rating for purposes of a credit. Such a finding does not require "physical evaluations, a medical history review, consideration of past and subsequent injuries, apportionment issues, etc." as asserted by claimant. A deputy commissioner does not act as a medical professional or utilize agency expertise when converting impairments ratings or locating a minimum, compulsory impairment rating as provided for in The Guides.

I therefore modify the deputy commissioner's determination regarding the Fund's credit and I find the Fund is entitled to receive a credit of 140 weeks for the 1953 first qualifying injury to the right eye, I find the Fund is entitled to receive a credit of 85.5 weeks for the April 23, 2018, second qualifying work-related left foot injury, and I find the Fund is entitled to receive an additional credit of 81.4 weeks for the 37 percent permanent disability of claimant's left total knee replacement which pre-existed the April 23, 2018, work injury, for a total credit to the Fund of 306.9 weeks.

I affirm the deputy commissioner's order that defendants employer and insurer pay claimant costs of the arbitration proceeding in the amount of $1,922.79.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 6, 2020, is affirmed in part, modified in part, and reversed in part.

Defendants Denver Findley and West Bend Mutual shall pay claimant healing period benefits from June 1, 2018, through May 29, 2019, at the weekly rate of two hundred forty-two and 71/100 dollars ($242.71).

Defendants Denver Findley and West Bend shall pay claimant eighty-five and one-half (85.5) weeks of permanent partial disability benefits at the weekly rate of two hundred forty-two and 71/100 dollars ($242.71) commencing May 30, 2019.

Defendants Denver Findley and West Bend shall pay accrued weekly benefits in a lump sum.

Defendants Denver Findley and West Bend shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants Denver Findley and West Bend shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

The Fund shall pay claimant three hundred and seventy-five weeks of permanent partial disability benefits at the weekly rate of two hundred forty-two and 71/100 dollars ($242.71) commencing on January 18, 2021.

The Fund shall receive a credit for all qualifying injuries against the award, for a total credit of three hundred six point nine (306.9) weeks. Therefore, after the credit, the Fund shall pay claimant sixty-eight and one-tenth (68.1) weeks of permanent partial disability benefits commencing on January 18, 2021.

Pursuant to Iowa Code section 85.30, interest accrues on unpaid Second Injury Fund benefits from January 18, 2021. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990).

Pursuant to rule 876 IAC 4.33, defendants Denver Findley and West Bend shall pay claimant's costs of the arbitration proceeding in the amount of one thousand nine hundred twenty-two and 79/100 dollars ($1,922.79), and defendants Denver Findley and West Bend and claimant shall split the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants Denver Findley and West Bend and the Fund shall file subsequent reports of injury as required by this agency.

Signed and filed on this 6th day of October, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Joseph Powell (via WCES)

James Ballard (via WCES)

Sarah Timko (via WCES)