BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RONALD G. MANLEY, Claimant, vs. SECOND INJURY FUND OF IOWA, Employer, Defendant.	File No. 5025431 A R B I T R A T I O N D E C I S I O N Head Note No.: 1803

STATEMENT OF THE CASE

Ronald Manley, claimant, has filed a petition in arbitration and seeks workers' compensation from the Second Injury Fund of Iowa, defendant.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on May 19, 2009 in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 10, with Exhibit 10 being administrative notice of the settlement with the employer for this injury; and Second Injury Fund of Iowa exhibits AA, BB, DD, EE and FF; as well as the testimony of the claimant.

ISSUES

The parties presented the following issues for determination:

1. Whether the alleged injury is a cause of permanent disability.

2. The extent of the claimant's entitlement to permanent partial disability benefits.

3. The commencement date for any permanent partial disability benefits awarded.

4. Whether the Second Injury Fund of Iowa is liable for any part of the claimant's industrial disability.

5. Costs of the action.

FINDINGS OF FACT

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

The claimant, Ronald Manley, was 56 years old at the time of the hearing. His education consists of a high school diploma in 1970, with "B" grades.

His work history consists of greenhouse and floral work for a floral supply company, as well as for a Wal-Mart store. He then worked as a salesman for advertising before beginning work for Maytag in 1987. (Ex. 6) Claimant then worked at Maytag for over 20 years before the plant closed in 2007.

In 1995, claimant sustained an injury to his right knee. That injury required surgery, and claimant was assigned a rating of permanent partial impairment of two percent of the leg. (Exhibit 1, page 2) Following that injury, claimant avoided walking on stairs or using ladders.

Claimant worked at Maytag, where his job duties required him to use his hands and arms making dryer heaters. Much of his work was with vibratory tools, as well as standing, gripping, or grasping. Over a period of several years, he began to experience numbness and tingling in his hands.

He suffered a stipulated cumulative work injury on February 15, 2007 involving his bilateral upper extremities. However, the Fund has disputed whether that injury resulted in any permanent impairment.

Claimant was treated by Delwin Quenzer, M.D. It was found claimant had work-related left median neuropathy at the wrist and elbow, and work-related right median neuropathy at the elbow.

Following his injury, claimant underwent four surgeries. The first was on May 14, 2007, for right carpal tunnel syndrome. On June 4, 2007, he underwent surgery for left carpal tunnel and median nerve conditions. On January 7, 2008, claimant underwent a third surgery, for left ulnar nerve neuroplasty at the elbow, and on the top of the left hand for Kienböck's disease. On April 14, 2008, claimant underwent surgery for right ulnar nerve neuroplasty at the elbow. (Ex. 3)

Claimant later underwent a functional capacity evaluation by Jana L .Kray, MSPT. That FCE showed claimant should not squat or kneel more than on an infrequent basis, should not climb ladders, and should climb stairs or crawl only occasionally. (Ex. 4, p. 40) The FCE also recommended claimant be placed in the "medium" work category, and given a 30-pound lifting restriction on an occasional basis, as well as being restricted from using his hands and arms repetitively. He was found to have shown good effort on the FCE. (Ex. 4) Dr. Quenzer adopted those restrictions. (Ex. 4, p. 38; Ex. 3, p. 33)

Claimant returned to work in between his second and third surgeries, but experienced pain in his arms while working. He kept working nonetheless, and was still working there when the plant closed in October 2007.

Claimant underwent two more surgeries after the plant closed. He testified the permanent restrictions he received would have prevented him from returning to his job at Maytag if the plant had remained open. The only job that would have been available was a stocking job that paid $4.00 per hour less.

The claimant settled his workers' compensation case against the employer, Maytag, and that settlement was approved by this agency on March 12, 2009. The claimant settled on the basis of a five percent body as a whole permanent partial impairment, based on the bilateral injury, and was paid 25 weeks of permanent partial disability benefits.

Since the plant closed, claimant has applied for many jobs. He has worked with Iowa Employment Solutions and also with the Iowa Division of Vocational Rehabilitation. (Ex. 7, Ex. 9) He has not found a new job and he has not worked since his last surgery a year ago. (Ex. 8) He has applied for jobs paying around $12.00 per hour. He was earning about $20.00 per hour when he was injured.

Claimant's tax returns are in evidence. His 2008 return shows income that includes his severance package when the plant closed, including accrued vacation and a health insurance buy out, as well as unemployment income. (Ex. BB, p. 5)

John D. Kuhnlein, D.O., conducted an independent medical examination of claimant. Dr. Kuhnlein recommended work restrictions of not using vibratory tools more than on an occasional basis, with anti-vibration gloves, as well as using pads on keyboards and edges of his work station. (Ex. 5, p. 54)

Dr. Kuhnlein did not find that claimant's injuries had extended beyond his arms into his shoulders. He specifically found that claimant's Kienböck's disease was not related to his work injury. (Ex. 5, p. 54)

Claimant testified that his right knee injury does still bother him at work, with swelling and pain after standing for long periods of time.

CONCLUSIONS OF LAW

The first issue is whether the alleged injury is a cause of permanent disability.

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v.

Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Dr. Kuhnlein in his IME stated: “However, overall, it appears that there was a sufficient exposure over a sufficient period of time to occupational risk factors for the development of carpal tunnel syndrome; I can state within a reasonable degree of medical certainty, that both carpal tunnel syndromes were related to his Maytag employment.” (Ex. 5, p. 50)

Dr. Kuhnlein also stated “With respect to the bilateral cubital tunnel syndrome, Mr. Manley describes similar occupational risk factors for cubital tunnel syndrome over a sufficient period of time, and I can state within a reasonable degree of medical certainty, that both cubital tunnel syndromes were related to his work at Maytag.” (Ex. 5, p. 50)

Dr. Kuhnlein noted claimant’s shoulder pain began back in 1992 and felt it was due to arthritis. He stated “It does not appear that Mr. Manley’s shoulder problems appear to be directly and causally related to the…February 15, 2007, injury. . . .” (Ex. 5, p. 51)

It is found that claimant’s current right and left hand and arm conditions are caused by his years of repetitive work with repetitive tools for Maytag, and that those conditions have resulted in permanent disability.

The next issue is the extent of the claimant’s entitlement to permanent partial disability benefits.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W.2d 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); Iowa Practice, Workers' Compensation, Lawyer and Higgs, section 17-1 (2006).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

Dr. Quenzer found claimant to have had a successful treatment of his bilateral upper extremity compressive neuropathies, and assigned a zero rating of impairment, in spite of claimant's multiple surgeries. (Ex. 3, p. 36)

Dr. Kuhnlein assigned claimant a rating of permanent partial impairment of seven percent of the right upper extremity for the carpal and cubital tunnel syndromes. (Ex. 5, p. 53) For the left upper extremity, he assigned a rating of three percent based on both the carpal tunnel and cubital tunnel conditions. (Ex. 5, p. 54)

Greater weight will be given to the opinions of Dr. Kuhnlein. Dr. Quenzer's conclusion claimant has no permanent impairment after suffering both cubital and carpal tunnel conditions in both arms and undergoing four surgeries is highly questionable.

Claimant was 56 years old at the time of the hearing. His age works against him in finding new employment. His education is limited to a high school diploma, which also puts him at a disadvantage compared to other job applicants. His work experience consists of a few years in the floral business and 20 years in manufacturing work for Maytag.

Claimant now has work restrictions that limit his ability to compete for jobs. If the plant where he worked had remained open, he most likely would have lost his job there because of those restrictions. The same factors would prevent him from finding a

similar job with another employer. Claimant has shown good motivation to find substitute work, but has been unsuccessful, further confirming his disability.

Based on these and all other appropriate factors of industrial disability, it is found claimant has, as a result of his work injury, an industrial disability of 35 percent, as a result of the combined disability from his first and second injuries. This entitles claimant to an award of 175 weeks, minus the impairment caused by the second injury, which is the responsibility of the employer, and his first injury.

Claimant has shown both a qualifying first injury and second injury. Claimant settled his claim against the employer for his second injury for an award of 25 weeks of benefits. Although the Fund is not bound by that settlement, there is no showing in the record that it is inappropriate. Claimant was a party to the settlement and is bound by it.

Claimant's first injury resulted in a two percent permanent partial impairment of his right leg. A leg is compensated at 225 weeks, so a loss of use of a leg is two percent of 225 weeks, or 4.5 weeks of benefits.

The Fund will be given a credit for 25 weeks and for 4.5 weeks, and will be responsible for the remainder of the award of 175 weeks of benefits, or 145.5 weeks.

The next issue is the commencement date for any permanent partial disability benefits awarded.

Claimant was released to return to full duty, unrestricted work by Dr. Quenzer on March 13, 2008 following his left elbow surgery. (Ex. 27) Claimant then underwent a surgery for his right elbow on April 14, 2008, which resulted in another healing period. He was released by Dr. Quenzer again on May 29, 2008, to light duty work, and found to be at maximum medical improvement on July 8, 2008. (Ex. 3, p. 31)

Claimant asserts a commencement date of March 13, 2008, through April 14, 2008, then re-commencing May 29, 2008. However, an award of permanent partial disability benefits against the Second Injury Fund of Iowa is to commence upon completion of the period of disability to be paid by the employer. The agreement for settlement recites that claimant was to be paid 25 weeks of benefits commencing March 13, 2008. Those payments would be intermittent in light of claimant's additional surgery thereafter and payment of temporary benefits. Thus, the 25 weeks to be paid by the employer shall first be paid pursuant to the settlement, that is, commencing March 13, 2008, and interrupted as necessary by any periods of further temporary disability that occurred. Upon completion of payment of the 25 weeks of benefits by the employer, the obligation for permanent partial disability benefits by the Second Injury Fund of Iowa shall commence. If claimant's proposed commencement date for Second Injury Fund benefits, which is the same as the commencement date for the employer, were to be adopted, claimant would be receiving two weekly permanent partial disability benefits for the same injury for the same week.

ORDER

THEREFORE IT IS ORDERED:

Defendant Second Injury Fund of Iowa shall pay unto the claimant one hundred forty-five and one half (145.5) weeks of permanent partial disability benefits at the rate of five hundred thirty-six and 77/100 dollars ($536.77) per week commencing upon completion of the permanent partial disability benefits obligation of the employer pursuant to the settlement between claimant and the employer, as set forth in the decision above.

Defendant Second Injury Fund of Iowa shall pay accrued weekly benefits in a lump sum.

Defendant Second Injury Fund of Iowa shall pay interest on unpaid weekly benefits awarded herein from the date of this decision, as set forth in Iowa Code section 85.30.

Defendant Second Injury Fund of Iowa shall be given credit for benefits previously paid.

Costs are taxed to Second Injury Fund of Iowa.

Signed and filed this __22nd___ day of July, 2009.

JON E. HEITLAND
DEPUTY WORKERS'
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