

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM BURGIN,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

File No. 5047452

A P P E A L

D E C I S I O N

Head Note Nos: 3200, 3202

**FILED**

JUL 27 2017

WORKERS' COMPENSATION

Defendant Second Injury Fund of Iowa (the Fund) appeals from an arbitration decision filed on November 30, 2015. Claimant William Burgin responds to the appeal. The case was heard on May 29, 2015, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 12, 2015.

In the arbitration decision, the deputy commissioner found claimant is entitled to benefits from the Fund because the deputy commissioner found claimant sustained a first qualifying injury to his left leg on April 27, 2010, in addition to the work-related left upper extremity injury which occurred on October 19, 2012, which is the subject of this proceeding. The deputy commissioner found the effects of the two injuries combined to result in 40 percent industrial disability, which entitles claimant to 200 weeks of permanent partial disability (PPD) benefits, less credits to the Fund. The deputy commissioner found the Fund is entitled to a credit of 4.4 weeks of PPD benefits for the April 27, 2010, injury and a credit of 32.5 weeks of PPD benefits for the October 19, 2012, work injury, for a total credit of 36.9 weeks of PPD benefits. The deputy commissioner found claimant is entitled to receive 163.1 weeks of PPD benefits from the Fund.

The Fund asserts on appeal that the deputy commissioner erred in finding claimant sustained a first qualifying injury on April 27, 2010, and in finding claimant sustained 40 percent permanent industrial disability as a result of the combined effects of the two injuries. The Fund asserts if it is found on appeal that claimant sustained a qualifying first injury on April 27, 2010, claimant has suffered minimal industrial disability due to the combined effects of the two injuries.

Claimant asserts on appeal that the arbitration decision should be affirmed 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.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed in this matter on November 30, 2015, which relate to issues properly raised on intra-agency appeal with the following additional analysis:

In 2010, claimant sustained an injury to his left knee which resulted in an extensive tear of his medial meniscus. (Ex. 1, p. 2) Thomas Gorsche, M.D. performed surgery on June 1, 2010. Claimant was placed at maximum medical improvement (MMI) on June 22, 2010. Administrative notice is taken of the compromise settlement filed with this agency on October 8, 2010. Exhibit A of that settlement sets forth Dr. Gorsche's April 12, 2010, impairment rating for the 2010 injury. Dr. Gorsche assigned two percent permanent impairment of the left lower extremity. As a result of that same 2010 injury, Sunil Bansal, M.D. also found two percent permanent impairment of claimant's left knee. Additionally, Dr. Bansal restricted claimant to standing and walking as tolerated. Dr. Bansal stated claimant should avoid standing or walking for more than 60 minutes at a time. Dr. Bansal also stated claimant should avoid multiple steps/stairs. (Ex. 1, p. 13) I find that as a result of the April 27, 2010, injury, claimant did sustain permanent impairment and loss of use of his left leg. I affirm the deputy commissioner's finding that claimant has established by a preponderance of the evidence that the April 27, 2010, injury constitutes a first qualifying injury under Iowa Code section 85.64.

The Fund also asserts the deputy commissioner erred in concluding claimant sustained 40 percent industrial disability from the combined effects of the two injuries. At the time of hearing, claimant was 48 years old. He graduated from high school. In 1995, claimant earned an automotive technology certificate from Hawkeye Community College. However, claimant never held a job which utilized that certificate. He lived in West Union, Iowa. His work history primarily includes heavy manual work as an auto rebuilder, construction worker, welding steel frames and manual labor. His primary occupation is truck driver. Most of his previous truck driving jobs involved manual labor; loading and unloading trucks, hooking and unhooking trailers and filling tanks. (Ex. 3, pp. 3-4) At hearing, claimant testified that of all of his prior jobs, the only one he remains physically capable of performing is his job at RJ Trucking.

As a result of the 2010 injury, claimant has the restrictions assigned by Dr. Bansal as noted above. As a result of the second injury, the 2012 left wrist injury, claimant sustained 13 percent permanent impairment of his upper extremity. Claimant

also has restrictions for the 2012 injury. Those restrictions, as set forth by Dr. Bansal, limit claimant to lifting up to ten pounds on an occasional basis and five pounds frequently with the left arm. (Ex. 1, p. 14) The treating orthopedic doctor, Peter Pardubsky, M.D., agreed with Dr. Bansal's restrictions for claimant's left upper extremity. (Ex. 2, p.1)

Following the 2012 injury, Lembke Trucking ended claimant's employment. At the time of the arbitration hearing, claimant was working for Wenthe Trucking. The work claimant performs for Wenthe is similar to the work he performed for RJ Trucking, but he does not need to do any lifting, pushing, pulling, etc. At Wenthe, claimant is simply required to drive the truck from point A to point B. Claimant testified he is supposed to unload the truck, but because he cannot move the pallets, many of the places where he delivers unload for him. Claimant testified that before his friend, Mr. Wenthe, offered him this job, he searched unsuccessfully for a job for several months.

Claimant's restrictions make it very difficult for him to return to the vast majority of his previous jobs. Claimant was unable to find employment in the open labor market until he was offered a job by his friend. He testified that although he is supposed to unload the truck at some locations, he is fortunate because those locations will unload for him.

Considering claimant's age, educational background, employment history, ability to retrain, motivation to obtain a job, permanent impairment, and permanent restrictions, and considering all of the other industrial disability factors set forth by the Iowa Supreme Court, I affirm the deputy commissioner's finding that claimant has sustained 40 percent industrial disability from the combined effects of the two injuries.

The Fund is entitled to a credit pursuant to Iowa Code section 85.64. The credit the Fund will receive will be 4.4 weeks for the 2010 injury to the left leg. That credit is as follows: left lower extremity – two percent times 220 weeks equals 4.4 weeks. The credit the Fund will receive for the April 27, 2012, injury to the left upper extremity will be 32.5 weeks. That credit is the greater of: 13 percent times 250 weeks equals 32.5 weeks, or the 32.5 weeks actually paid by the employer. Therefore the total credit the Fund will receive is 36.9 weeks (4.4 plus 32.5).

#### ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on November 30, 2015, is affirmed in its entirety.

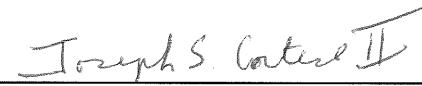
The Second Injury Fund of Iowa shall pay claimant one hundred sixty-three point one (163.1) weeks of permanent partial disability benefits commencing thirty-two point

five (32.5) weeks following September 18, 2013, at the weekly rate of seven hundred twelve and 82/100 dollars (\$712.82).

The Fund shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30. Interest accrues on unpaid Second Injury Fund benefits from the date of the decision. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990).

Pursuant to rule 876 IAC 3.1(2), The Fund shall file subsequent reports of injury as required by this agency.

Signed and filed this 27<sup>th</sup> day of July, 2017.

  
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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

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