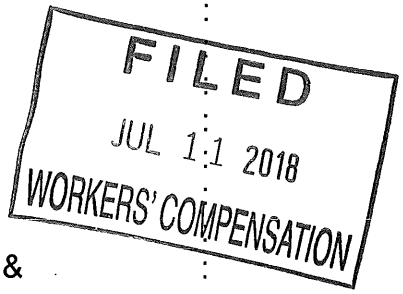
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



LEROY MOTEN, JR.,	
Claimant,	
vs.	File No. 5058905
STEINHOFF LANDSCAPE & CONSTRUCTION,	
Employer,	ARBITRATION
and	DECISION
IOWA MUTUAL INSURANCE COMPANY,	
Insurance Carrier,	
SECOND INJURY FUND OF IOWA,	Head Note Nos.: 1108.50; 1402.40; 1804; 3202
Defendants.	

STATEMENT OF THE CASE

Leroy Moten, Jr., claimant, filed a petition in arbitration seeking workers' compensation benefits from Steinhoff Landscape & Construction, employer and Iowa Mutual Insurance Company, insurance carrier and the Second Injury Fund of Iowa, as defendants. Hearing was held on June 18, 2018 in Sioux City, Iowa.

Claimant, Leroy Moten, Jr., was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE5, claimant's exhibits 1-2, and defendant's exhibits A-K.

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.

The parties chose not to submit post-hearing briefs.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained any permanent disability to his right upper extremity as a result of the stipulated November 11, 2015 work injury?
2. Whether claimant is entitled to benefits from the Second Injury Fund? If so, the extent of those benefits.

FINDINGS OF FACT

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

Claimant, Leroy Moten, Jr., (hereinafter "claimant" or "Leroy") has alleged that he sustained temporary and permanent disability to his right hand as a result of a November 11, 2015 work injury. At the time of the injury he was working for Steinhoff Landscape and Construction (hereinafter "Steinhoff"). Claimant is also seeking benefits from The Second Injury Fund of Iowa. Leroy contends that he sustained a first qualifying injury to his left hand and wrist in 2004 when he fell through a window. I find that claimant did sustain permanent disability as a result of the injuries and is entitled to benefits from the Second Injury Fund of Iowa.

Leroy testified that the first injury in question occurred on September 24, 2004 when he fell through a window and injured his left hand and wrist. This was not a work-related injury. His left hand is his dominant hand. His median nerve and flexor tendons were cut and ultimately required two surgeries. He primarily treated with Philip A. Deffer, Jr. M.D. It appears that the last time he treated with Dr. Deffer for his left hand was on March 14, 2005. At that time, the doctor noted that his motion was excellent. However, he still did not have good dorsal flexion of his wrist. He was allowed to return to full activity including weight lifting. On March 30, 2006, Leroy saw Dr. Deffer for a pre-employment check because he was applying for a job at VT Industries. The doctor noted that Leroy had been working the last 8 months as a roofer with no problems. Dr. Deffer examined Leroy and found no reason to restrict his work. He noted that Leroy had used vibratory equipment since his injury without problems. (Testimony; JE1, JE2)

Leroy testified that he sustained the November 11, 2015 work injury to his right hand when he was changing a skid plate. He was using an impact wrench on a bolt when the bolt accidentally went down into the palm of his right hand. He sustained a moon shape laceration where the bolt went into the base of the palm of his hand.

On the date of the injury he was seen at the emergency room at Unity Point. He had a 2 cm laceration on his right hand, palmar surface. Leroy received 5 sutures. He was instructed to return in 10 days for suture removal. He returned to work that same day. (JE3; Testimony)

On April 8, 2016, Leroy went to Mercy Business Health Services where he saw Rodney L. Cassens, M.D. He reported some dimpling of his skin and discomfort at the base of the palm of his hand with extreme extension of his right middle finger. The doctor's assessment was laceration, palmar surface right hand with likely subcutaneous scarring and adherence of subcutaneous tissue to the tendons. Dr. Cassens referred Leroy to a hand specialist. No work restrictions were given. (JE4) Leroy was referred to Russell DeGroote, M.D., at DeGroote Orthopedics. (Testimony)

Dr. DeGroote saw Leroy on April 18, 2016. Leroy described his pain as catching and rated the pain as 2/10. He reported some tearing feelings when he takes his hands through full range of motion. He also had pain when he pressed down on that area. He had been working full duty. Dr. DeGroote's assessment was scar tissue, right carpal tunnel. He recommended that Leroy continue to use his hand until the six-month mark. He discussed the possibility of carpal tunnel release, but the doctor felt that Leroy would respond well to conservative management. He allowed Leroy to continue full duty work. (JE5, pp. 22-24)

There is a work restriction sheet in evidence dated May 23, 2016, signed by Dr. DeGroote which restricts Leroy to light duty work. (JE5, p. 25) Dr. DeGroote saw Leroy again on June 2, 2016. Leroy described his right hand pain as aching. He was not having any numbness or tingling to the median nerve distribution. He was still experiencing some discomfort and swelling at the laceration at the transverse carpal ligament. He released Leroy back to full duty work effective June 2, 2016. Dr. DeGroote noted that Leroy was not at maximum medical improvement (MMI). He was to return in six months. (JE5, pp. 26-28) When Leroy saw Dr. DeGroote on November 29, 2016 he rated his aching pain as a 3 or 4 out of 10. The doctor placed Leroy at MMI and discharged him from the clinic. Dr. DeGroote recommended conservative treatment. He did not recommend surgery. Leroy was to continue work without restrictions. (JE5, pp. 29-31) On March 10, 2017, Dr. DeGroote provided an impairment rating. He stated that Leroy did not meet the criteria for any permanent partial impairment. (JE5, p. 32)

At the request of his attorney, Leroy underwent an IME with Sunil Bansal, M.D. The IME took place on April 24, 2017. With regard to Leroy's right hand, Dr. Bansal noted that Leroy did not have pain when he woke in the morning, but after a day of work he had significant pain and swelling. Leroy also reported numbness and tingling of his third finger and triggering and cramping. Additionally, Leroy had cramping of his second and fourth fingers. Leroy felt that his right hand was weaker since the injury. Dr. Bansal notes that at the time of his evaluation Leroy was working building bridges, lifting re-bar and frames and performing finishing work. Dr. Bansal's diagnosis of the right hand was laceration of the palmar surface of the right hand with likely subcutaneous scarring and adherence of subcutaneous tissue to the tendon resulting in median nerve impingement. He agreed with Dr. DeGroote that Leroy was MMI as of November 29, 2016. Dr. Bansal assigned 3 percent impairment of the right upper extremity due to partial sensory loss of the second finger, loss of range of motion of the MP joint on the

third finger, and for sensory loss due to a median nerve component. Dr. Bansal restricted Leroy to no lifting greater than 45 pounds with his right arm. (Cl. Ex. 1)

Dr. Bansal also examined Leroy's left hand during the IME. Leroy reported that he continued to have pain in the second and third fingers on his left hand. He had constant numbness of the proximal aspects of his ring finger and thumb. Dr. Bansal's diagnosis for the left hand was flexor tendon laceration and median nerve laceration. He noted adhesions between the healed tendon and skin which limited his ability to fully extend his index and middle fingers. Dr. Bansal assigned 2 percent impairment to the left upper extremity. The impairment rating was based on digital sensory deficits. He restricted Leroy to lifting 45 pounds with the left arm. (Cl. Ex. 1)

I find the impairment ratings of Dr. Bansal to be persuasive. Leroy testified about the ongoing symptoms he experiences as a result of his two injuries. Dr. Bansal provides the basis for his ratings pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. I find that as a result of the November 11, 2015 injury to his right hand he sustained 3 percent permanent functional impairment to his right upper extremity. I find that as a result of the 2004 injury to his left hand he sustained 2 percent permanent functional impairment to his left upper extremity.

We now turn to the issue of permanent restrictions. The only physician to assign permanent restrictions to Leroy is Dr. Bansal. Leroy testified he believes that the restrictions provided by Dr. Bansal are consistent with his abilities. Leroy testified that he has not provided Dr. Bansal's restrictions to any of his employers because his job duties have not required him to work outside of those restrictions. (Testimony; Cl. Ex. 2)

I do not find Dr. Bansal's opinion regarding restrictions to be persuasive. Dr. Bansal does not provide the rationale or basis for his opinion. Furthermore, I find the physical capacity profile performed on April 13, 2017 to be more persuasive than the opinion of Dr. Bansal. The physical capacity profile was based on testing of Leroy's strength and ability. Thus, I find that Leroy is capable of working in the very heavy work category. Additionally, none of the physicians that treated Leroy for either of his injuries have assigned permanent restrictions. Therefore, I find that Leroy does not have any permanent restrictions placed on his activities.

Although I find Leroy does not have any permanent restrictions placed on his activities, I find that he does still experience symptoms or difficulties as a result of his injuries.

At hearing, Leroy testified that as a result of the injury and subsequent treatment he has a knot in his left wrist. It is his understanding that this knot, or raised skin, is scar tissue from his operations. He still experiences a loss of feeling, numbness and tingling in parts of his thumb, first, second, and third fingers. He feels that as a result of that 2004 injury his hand tires more quickly and he lacks strength in his left hand. (Testimony)

With regard to the November 11, 2015 work injury to his right hand I find that Leroy has sustained 3 percent permanent partial impairment to his left upper extremity. Thus, claimant has shown entitlement to 7.5 weeks of permanent partial disability benefits as a result of the November 11, 2015 work injury.

Leroy testified that he still has problems with his right hand. It is his understanding that the bump in his right wrist is a calcium deposit which is a result of the injury. His second finger swells with repetitive use. He has pain and swelling, numbness and tingling in his first and second fingers. He also still experiences swelling in the palm of his hand. (Testimony)

I find that as a result of the 2004 injury I find that he sustained a loss of use of his left hand. Specifically, he sustained 2 percent permanent functional permanent impairment.

I find that Leroy sustained a loss of use of his right upper extremity as a result of the 2004 injury. I further find that he has sustained the loss of his left upper extremity as a result of the 2015 work injury. Additionally, I find that he has sustained permanent disability to his right and left upper extremities as a result of those injuries.

Leroy performed his normal job duties at Steinhoff from March until May 18, 2016. Leroy was terminated from Steinhoff for ongoing use of a company vehicle for personal use. His termination was effective May 18, 2016. (Testimony, Cl. Ex. A, pp.1-2) I find that Leroy's termination from Steinhoff was not related to the work injury.

Leroy also worked part-time as a bartender from approximately August 2015 to January 2016. Leroy testified he did this to earn some extra money. (Ex. B)

After Leroy was terminated from Steinhoff he applied for a job at Gobersen's in Ida Grove. Gobersen's is a company that builds bridges. He applied for a job as a laborer. Leroy had worked in this position at some point prior to working at Steinhoff. At the time he applied for the job he did not have any restrictions placed on either of his hands. He was re-hired. When working for Gobersen's in 2016 Leroy experienced symptoms in both of his hands, left greater than right. He had difficulty tying rebar and he generally felt that his ability to lift was much weaker than before. (Testimony)

Because Leroy continued to experience problems with his hands so he decided to look into becoming a crane operator. He obtained the necessary licenses to become a certified crane operator. He took the initiative and paid for the necessary training. (Testimony)

Leroy began working as a certified crane operator for Wick's Crane Services. This job required him to travel frequently. He only stayed in each location one or two days at a time. He did not like the travel so he left this job. (Testimony)

He went to work for United Contractors in August of 2017 and was still working there at the time of the hearing. He works as a crane operator. To operate the crane, he uses both of his hands to pull levers. Some days he operates the crane continuously, while other days he only operates the crane for a couple hours. The work does aggravate his hands some. However, if his symptoms are flared he is able to stop his crane work. His base pay is $24 per hour. However, depending on the job, he could earn as much as $10 per hour over base pay. (Testimony)

After the work injury, Leroy worked at West Rock in Sioux City from May 2014 to June of 2017. He was paid $15.30 per hour. As part of that employment he was tested on April 13, 2017 for a physical capacity profile. His physical testing placed him in a job level 5, which was the highest level and placed him in the very heavy work category. The job he was performing there was a level 4, heavy demand job. At hearing Leroy testified that he could not go back and perform that work again due to his hands. The undersigned notes that this physical capacity profile testing was performed approximately two weeks before the IME of Dr. Bansal. (Ex. D; Cl. Ex. 1)

At the time of the hearing Leroy was 31 years old. Although he did not graduate from high school he did obtain his GED in 2006 or 2007. He also attended Des Moines Area Community College for a couple of years. He is one semester short of earning a degree in culinary arts. He also took some classes at Western Iowa Community College for surgical technician. However, he had just barely started his work towards that degree when he had a child and stopped his schooling.

Leroy has been constantly employed since he left high school. To his credit, after he was injured, he took the initiative to obtain additional training. Leroy invested in himself and developed additional work skills. His additional training put him in the position of being able to earn more per hour than he was earning at the time of the injury.

Leroy believes he would physically be able to return to home renovation and roofing jobs, but he would not be able to support his family on those wages. He believes that he could not return to his jobs at Gobersen's or Steinhoff because his hands would prevent him from performing the heavy lifting those jobs required. He does feel that he could return to working as a cook at Lori's Place, a restaurant, where he was only required to lift up to 40 pounds. He also testified that he could not return to working Unique Flowers & More because that job required him to lift stones in excess of 45 pounds. Leroy testified that he cannot return to many of his prior jobs because those jobs require him to work outside of Dr. Bansal's restrictions. However, I did not find those restrictions to be persuasive. Although Leroy is not restricted from performing his other jobs, I find he would still experience some difficulty or an increase in symptoms from performing some of those duties.

Considering Leroy's age, educational background, employment history, ability to retrain, motivation to obtain a job, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that Leroy has sustained a 10 percent loss of future earning capacity as a result of the cumulative effect of his injuries.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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).

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).

A wrist injury is an injury to the arm, not the hand. Holstein Elec. v. Breyfogle, 756 N.W.2d 812 (Iowa 2008).

Based on the above findings of fact, I conclude that Leroy sustained 3 percent permanent partial impairment to his left upper extremity as a result of the November 11, 2015 work injury. Thus, claimant has shown entitlement to 7.5 weeks of permanent partial disability benefits as a result of the November 11, 2015 work injury. These 7.5 weeks of permanent partial disability benefits shall commence on the stipulated date of November 12, 2015.

We now turn to the Second Injury Fund claim. 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.

Based on the above findings of fact, I concluded that claimant had established entitlement to benefits from the Second Injury Fund of Iowa.

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).

Iowa Code section 85.64, provides a means for injured workers to obtain these disability benefits that exceed the amount attributed to the first and second injury, which provides in pertinent part:

> In addition to such compensation, *and after the expiration of the full period provided by law for the payments thereof by the employer*, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ. (Emphasis added.)

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).

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. 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.

Based on the above findings of fact, I conclude that claimant sustained 10 percent industrial disability for the combined effect of the qualifying first and second work injuries.

Ultimately, the Fund's liability is for claimant's industrial disability due to the combination of the scheduled injuries minus the credit for the impairment assigned to each of the scheduled injuries. I found that the first qualifying injury resulted in 2 percent impairment to the upper extremity (5 weeks). I further found the second qualifying injury resulted in 3 percent impairment to the upper extremity (7.5 weeks). Therefore, the Fund receives a total credit of 12.5 weeks. Thus, the Fund is responsible for 37.5 weeks of permanent partial disability benefits. These benefits shall commence at the last date benefits are due from the employer for the second qualifying injury.

Unlike employers, the Fund is obligated to pay interest only from the date of the award. Thus, interest does not begin to accrue until the date of the decision. See Second Injury Fund v. Braden, 459 N.W.2d 467, 473 (Iowa 1990).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of five hundred seventy-one and 55/100 dollars ($571.55).

Defendants employer and insurance carrier shall pay shall pay seven point five (7.5) weeks of permanent partial disability benefits commencing on the stipulated commencement date of November 12, 2015.

Defendants employer and insurance carrier shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) 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 (2) percent. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

The Second Injury Fund of Iowa shall pay thirty-seven point five (37.5) weeks of permanent partial disability benefits commencing at the last date benefits are due from the employer for the second qualifying injury.

The Second Injury Fund of Iowa shall pay interest from the date of the decision. See Second Injury Fund v. Braden, 459 N.W.2d 467, 473 (Iowa 1990).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 11th day of July, 2018.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EQP/kjw

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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.