

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAUL ROTH,

Claimant,

VS.

SECOND INJURY FUND OF IOWA.,

Defendant.

File No. 5064881

ARBITRATION DECISION

Head Notes: 1402.40, 1803.1,
3202

STATEMENT OF THE CASE

Paul Roth filed a petition seeking workers' compensation benefits from:

- Self-insured employer Lowe's Home Centers, Inc. (Lowe's) for an alleged injury to his left leg on June 6, 2018; and
- The Second Injury Fund of Iowa (Fund) for an alleged first qualifying loss to his right arm relating to a work injury on May 6, 2018, and the alleged June 6, 2018 work injury.

Roth and Lowe's previously settled a case stemming from Roth's alleged May 6, 2018 injury. They also settled their dispute regarding the alleged June 6, 2018 injury before hearing. The undersigned took administrative notice of the parties' settlements.

Roth and the Fund did not reach a settlement. Their contested case went to hearing on October 24, 2019, with the undersigned presiding. Roth participated personally and through attorney Christopher D. Spaulding. The Fund participated by and through Assistant Attorney General Tonya A. Oetken.

ISSUES

Under rule 876 IAC 4.149(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

- 1) Did Roth sustain a first qualifying loss to the right arm on or about April 25, 2018?

- 2) Did Roth sustain a second qualifying loss to the left leg on or about June 6, 2018?
- 3) Is Roth entitled to benefits through the Fund?
- 4) If Roth is entitled to benefits through the Fund, is the Fund entitled to a credit equal to thirty-three and 7/10 (33.7) weeks or sixty-seven and 4/10 (67.4) weeks of workers' compensation benefits?

STIPULATIONS

In the hearing report, the parties entered into the following stipulations:

- 1) An employer-employee relationship existed between Roth and Lowe's Home Centers, Inc. at the time of the alleged work injury.
- 2) Roth sustained an injury which arose out of and in the course of his employment with Lowe's Home Centers, Inc.
- 3) At the time of the stipulated injury:
 - a) Roth's gross earnings were six hundred fifty-five and 21/100 dollars (\$655.21) per week.
 - b) Roth was married.
 - c) Roth was entitled to three exemptions.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

FINDINGS OF FACTS

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 5;
- Claimant's Exhibit (Cl. Ex.) 1; and
- Hearing testimony by Roth.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

On April 25, 2018, Roth injured his right arm when he lifted an 80-pound bag of concrete. (Jt. Ex. 3, p. 21) He was lifting a piece of siding on May 5, 2018, when he felt

pain which he later said he believed to be a tear of his biceps tendon. (Jt. Ex. 3, p. 21) Ultimately, Roth went to Des Moines Orthopedic Surgeons (DMOS), where Jeffrey Rodgers, M.D., performed surgery to reinsert Roth's distal biceps tendon on May 24, 2018. (Jt. Ex. 3, pp. 24, 40–41) Roth participated in physical therapy to rehabilitate his injured arm. (Jt. Ex. 3, pp. 25–36).

On June 5, 2019, Dr. Rodgers examined Roth. (Jt. Ex. 3, p. 37) He noted, "No soft tissue swelling, no localized joint pain, and no localized joint swelling" and "[s]upination strength 5/5 and symmetric to left." (Jt. Ex. 3, p. 37) Dr. Rodgers also observed mild tenderness to the volar forearm, which felt weaker on the right. (Jt. Ex. 3, p. 37)

Dr. Rodgers concluded Roth had reached maximum medical improvement (MMI). (Jt. Ex. 3, p. 38) He released Roth to return to work without restrictions. (Jt. Ex. 3, pp. 37–38) In response to a check-box letter from the administrator with which Lowe's contracts for workers' compensation claims, Dr. Rodgers indicated Roth had not sustained a permanent impairment due to his right arm injury. (Jt. Ex. 3, p. 38) It is unclear whether Dr. Rodgers used the Fifth Edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Guides) when opining on permanent impairment because the check-box letter does not specify an edition and Dr. Rodgers did not state what edition he might have used. (Jt. Ex. 3, p. 38)

On or about June 6, 2018, Roth sustained an injury when he stepped in a hole while walking in the parking lot of the Lowe's where he worked. (Hrg. Tr. p. 31) Lowe's chose Joseph Brunkhorst, III, D.O., at DMOS as Roth's care provider. Dr. Brunkhorst ordered magnetic resonance imaging (MRI), which "show[ed] a partial tear of the left proximal hamstring complex with 3 cm of retraction of the partial tear. Also partial tears of the left and right gluteus minimus and medius tendons." (Jt. Ex. 5, p. 42) Dr. Brunkhorst recommended conservative treatment in the form of physical therapy. (Jt. Ex. 5, p. 42)

After completing physical therapy, Roth saw Dr. Brunkhorst on October 1, 2018. (Jt. Ex. 5, p. 44) At the time, Roth was still under work restrictions for his right arm injury. (Jt. Ex. 5, p. 44) Dr. Brunkhorst released Roth to return to work without restrictions despite Roth reporting he continued to experience pain, stiffness, and tightness, "especially with increased weighted activities and brisk walking." (Jt. Ex. 5, p. 44) In a letter dated November 21, 2018, Dr. Brunkhorst used the Fifth Edition of the Guides to opine Roth does not have a permanent impairment to his left leg due to the work injury. (Jt. Ex. 5, p. 46)

Because Roth disagreed with the opinions of Drs. Rodgers and Brunkhorst on permanent impairment, he obtained an independent medical examination (IME) with Robert Rondinelli, M.D. (Cl. Ex. 1) Dr. Rondinelli reviewed the medical records relating to Roth's care for his right arm and left leg injuries. (Cl. Ex. 1, p. 1) He also conducted an in-person interview and examination with Roth that lasted about one hour and 45 minutes on June 13, 2019. (Cl. Ex. 1, p. 1) As part of Dr. Rondinelli's physical examination, he measured Roth's grip strength and forearm supination. (Cl. Ex. 1, pp.

5–7) He also performed goniometric studies and compared Roth's hip flexion contracture (extension lag) and internal rotation. (Cl. Ex. 1, pp. 5–6)

Based on the findings of his physical examination, Dr. Rondinelli used the Fifth Edition of the Guides to rate Roth's physical impairment of the right arm as follows:

For [Roth's] distal avulsion tear of the right biceps and with reference to *the AMA Guides* Chapter 16, The Upper Extremities, and specifically Table 16-34 ("% Strength Loss Index") found on page 509, he has a reduction in measurable grip strength on the right side versus left of approximately 18%. This reduction corresponds to 10% upper extremity impairment (UEI). Additionally, he has a reduction in right forearm supination to 30 degrees versus 70 degrees on his unaffected left side. According to Figure 16-37 on page 474, this is worth 2% UEI, which can be combined with the strength-loss impairment described above. According to the combined values chart, he then has 12% UEI resulting from separate loss of grip strength and forearm supination of the right upper extremity to his biceps avulsion tear and surgical repair.

(Cl. Ex. 1, p. 6)

Dr. Rondinelli performed a thorough examination of Roth, taking detailed measures of his physical capabilities. The IME report demonstrates he also diligently utilized the Guides when opining on what, if any, permanent impairment Roth sustained due to his right arm injury at Lowe's. Dr. Rondinelli's opinion was also based on an examination closer in time to the hearing. For these reasons, Dr. Rondinelli's opinion on permanent impairment to Roth's right arm is more persuasive than Dr. Rodgers's. Dr. Rondinelli's opinion on permanent impairment to the right arm is therefore adopted.

On the question of what, if any, permanent impairment the work injury to Roth's left leg caused, Dr. Rondinelli opined:

For his left hamstring proximal insertion tear and with reference to *the AMA Guides* Chapter 17, The Lower Extremities, and specifically Table 17-9 page 537 ("Hip Motion Impairment") and using the goniometric results cited above, Mr. Roth has limitation in hip flexion on the left side to 80 degrees, which corresponds to a 5 % lower extremity impairment (LEI) or 2% whole person impairment (WPI), respectively. His hip flexion contracture (extension lag) of – 10 degrees is also worth 5 % LEI or 2% WPI, respectively. Furthermore, his hip internal rotation limited to 15 degrees is again worth 5% LEI or 2% WPI. These impairments are additive for 15% LEI or 6% WPI, respectively.

In addition to the above, he has a healed partial hamstring tear verified on MRI of the left thigh/hamstrings from July 27, 2018, which showed a high-grade partial tear of the left hamstring complex – technically the biceps femoris and semitendinosus components – both of which were retracted

and were evident in addition to partial tears of the left and right gluteus minimus and medius tendons, respectively. This has affected his hamstring functioning and residual strength. According to The Lower Extremities (Chapter 17) deficits in muscle function can be revealed (through a closed kinetic chain exercise and testing) to reveal the following: Mr. Roth has difficulty extending his left hip using the gluteus and hamstring muscles while functioning in a concentric mode; and also controlling his left knee extension in an eccentric mode. I would rate his hamstring strength as 4/5 (with active movement against gravity, with some resistance, but not complete resistance), citing pain limitations to normal strength of the left hamstrings at this time. Table 17-8 on page 532 shows that loss of hip extension of grade 4 severity corresponds to a 17% lower extremity impairment (LEI), or 7% whole person impairment (WPI) rating at this time. This weakness is of a mechanical nature and not due to a peripheral nerve disorder.

(Cl. Ex. 1, pp. 6–7)

Dr. Rondinelli's IME report demonstrates he conducted a thorough physical examination of Roth. This included detailed findings with respect to the physical limitations caused by the June 6, 2018 work injury. Dr. Rondinelli's opinion on permanent impairment is more persuasive than Dr. Brunkhorst's. This decision adopts Dr. Rondinelli's opinion on the permanent impairment to the hip caused by the June 6, 2018 injury.

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); Iowa Code § 3.7(1). Because the alleged second injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

1. Fund Benefits.

The legislature created the Fund in 1945 and expanded its scope in 1951 to create an incentive for employers to hire workers with disabilities. Gregory v. Second Injury Fund, 777 N.W.2d 395, 397–98 (Iowa 2010). “Under the current version of section 85.64, the Fund is implicated in a workers' compensation claim when an employee suffers successive qualifying injuries.” Id. at 398. To establish entitlement to benefits from the Fund, Roth must prove by a preponderance of the evidence:

- 1) A first qualifying loss to a hand, arm, foot, leg, or eye;

- 2) A second qualifying loss in the form of a permanent disability to such a member caused by a work injury that is compensable under the Iowa Workers' Compensation Act; and
- 3) The permanent disability resulting from the first and second injuries exceeds the compensable value of the previously lost member. Id. at 398-99 (citing Iowa Code § 85.64 and Second Injury Fund v. Shank, 516 N.W.2d 808, 812 (Iowa 1994)).

Other than the express requirement that the second loss be the result of permanent disability caused “by a compensable injury,” the text of section 85.64(1) provides no basis from which to create different standards for what constitutes a qualifying loss to an enumerated body part based on whether it happened first or second in time. See Iowa Code § 85.64(1). Moreover, the Iowa Supreme Court held it would be “senselessly inconsistent” to apply different standards based on the order of occurrence. Gregory, 777 N.W.2d at 400. Therefore, the caselaw delineating the contours of what constitutes a qualifying loss under the statute is generally applicable regardless of when such a loss took place. See Id.

To qualify under section 85.64(1), a loss must be permanent but it “need not be a total loss or loss of use.” George, 737 N.W.2d at 146 (citing Irish v. McCreary Saw Mill, 175 N.W.2d 364, 368 (Iowa 1970)). An injury to a listed body part compensated based on a functional impairment under the schedule in section 85.34(2) constitutes a qualifying loss. Id. (citing Second Injury Fund v. Braden, 459 N.W.2d 467, 469 (Iowa 1990) and Second Injury Fund v. Bergeson, 526 N.W. 543, 547 (Iowa 1995)).

By creating the Fund and expanding its scope, the legislature “did not intend to disadvantage claimants with histories of more complex combinations of enumerated and unenumerated member injuries.” Gregory, 777 N.W.2d at 401. Therefore, an injury that satisfies the statute can occur to a member listed in section 85.64(1) in concert with an injury to one or more other body parts. Id. at 399–400; see also George, 737 N.W.2d at 147. This includes when an injury occurs at the point where an enumerated body part connects to an unenumerated body part so long as the resultant permanent disability was not confined to the unenumerated body part. Stumpff, 543 N.W.2d at 907; Gregory, 777 N.W.2d at 400–01. Further, an injury to a listed body part may constitute a qualifying loss even if the injury causes impairment to the whole body so long as the listed body part sustained some permanent impairment. Gregory, 777 N.W.2d at 400–01.

However, some histories of complex injuries do not meet the qualifying loss requirement under the Iowa Supreme Court’s construction of the statute. An injury to a member not listed in section 85.64(1), such as a finger, that affects “to some extent” a listed member, such as the hand, does not constitute a qualifying loss. Stumpff v. Second Injury Fund, 543 N.W.2d 904, 906 (Iowa 1996). Likewise, an injury to the whole body that merely affects an enumerated body part does not satisfy the statutory requirement for a qualifying loss. Second Injury Fund v. Nelson, 544 N.W.2d 258, 262, (Iowa 1995).

a. First Qualifying Loss.

Under Iowa Code section 85.64(1), an employee seeking benefits from the Fund must show the employee “previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye.” A “first qualifying injury need not be a work-related injury.” Gregory, 777 N.W.2d at 399. Further, a first loss need not have occurred due to a traumatic incident. See Shank, 516 N.W.2d at 815–16 (affirming the Commissioner’s conclusion that a congenital vision defect constitutes a first qualifying loss under the statute). The standards for a qualifying loss discussed above also govern.

Roth has satisfied his burden of proof on this element. As found above, Dr. Rondinelli’s opinion on permanent impairment relating to Roth’s right-arm injury is more persuasive than that of Dr. Rodgers. The evidence shows it is more likely than not he sustained an injury to his right arm that caused permanent impairment. The permanent partial disability to Roth’s right arm satisfies the first loss requirement for Fund liability.

b. Second Qualifying Loss.

In order for an employee to be entitled to Fund benefits, the employee must sustain permanent disability to another hand, arm, foot, leg, or eye, caused by a second injury. The second injury must result in permanent disability “compensable” under the Iowa Workers’ Compensation Act—i.e., it must arise out of and in the course of employment. The caselaw on qualifying loss discussed above applies.

The evidence establishes Roth sustained an injury arising out of and in the course of his employment with Lowe’s on June 6, 2018. The parties dispute whether Roth’s injury caused a loss to his leg or just his hip and therefore the body as a whole. The fighting question is whether Roth sustained a qualifying second loss to his leg as a result of his June 6, 2018 work injury.

Dr. Rondinelli addressed the question of causation and permanent disability caused by the injury. His opinion is credible. Dr. Rondinelli concluded Roth’s June 6, 2018 work injury caused permanent impairment in two ways.

First, Dr. Rondinelli opined Roth sustained permanent impairment due to limitation in hip flexion and internal hip rotation. He used Table 17-9 on page 537 of the Guides to measure Roth’s “Hip Motion Impairment.” Dr. Rondinelli provided no express impairment of the left leg with respect to this impairment rating in this portion of his report.

Dr. Rondinelli next addressed Roth’s partial hamstring tear, which was technically to the biceps femoris and semitendinosus components, in reference to how it impaired his hip. Dr. Rondinelli opined the injury “affected his hamstring functioning and residual strength.” (Cl. Ex. 1, p. 7) He used Table 17-8 on page 532 of the Guides to rate the impairment Roth’s hamstring and hip injury combined to have on his loss of hip extension. Dr. Rondinelli did not provide a discrete impairment rating to Roth’s left leg as a result of the torn hamstring.

The Iowa Supreme Court has made clear:

Liability of the Fund under section 85.64 expressly turns on the *part(s) of the body* permanently injured in successive injuries. The focus of our analysis must therefore be on whether [the claimant] sustained a partial permanent loss of at least two enumerated members in successive injuries.

Gregory, 777 N.W.2d at 400 (emphasis in original). In Gregory, the claimant sustained injury to the left hand and shoulders resulting in a discrete functional impairment to the hand of two percent as well as permanent disability to the body as a whole from the shoulder injuries. Id. at 400–01. Therefore, under section 85.64(1), Gregory’s hand injury qualified as a “loss” because it caused a discrete permanent impairment to the enumerated body part of the hand regardless of whether that impairment was included as part of a permanent disability to the body as a whole. Id.

Iowa Code section 85.64(1) includes the leg among the body parts covered by the Fund, but not the hip. “A ‘leg,’ under the general understanding of the word, simply does not include a hip.” Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834, 839 (Iowa 1986); see also Nelson, 544 N.W.2d at 269–70. An injury to the hip resulting in permanent disability to the whole body must do more than “affect” a leg to trigger Fund liability. Nelson, 544 N.W.2d at 262. An injury to the leg and hip must result in a discrete permanent loss to or loss of use of the leg to be compensable under the Second Injury Compensation Act. See Gregory, 777 N.W.2d at 400–01; see also George, 737 N.W.2d at 146–47.

Dr. Rondinelli opined Roth sustained a torn hamstring and this injury “affected his hamstring functioning and residual strength.” But the Iowa Supreme Court has made clear that Fund liability requires more than an injury that affects a listed body part; it must cause a loss. Dr. Rondinelli did not assign a discrete functional impairment to Roth’s leg. He opined only that the injuries to the leg and hip resulted in a permanent impairment to the hip. Therefore, it is more likely than not the injury merely affected Roth’s leg and caused permanent disability to the hip, which constitutes a permanent disability to the body as a whole.

For these reasons, Roth has failed to meet his burden on the question of whether he sustained a second qualifying loss under Iowa Code section 85.64(1). There is an insufficient basis in the record from which to conclude Roth sustained a loss to his leg that is the result of a permanent disability from the June 6, 2018 work injury. Roth has failed to establish entitlement to benefits from the Fund. Therefore, this decision does not address the other disputed issues.


ORDER

Based on the above findings of fact and conclusions of law, it is ordered:

- 1) Roth shall take nothing more from this case.

2) The parties shall be responsible for their own hearing costs.

Signed and filed this 27th day of December, 2021.


BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Christopher Spaulding (via WCES)

Amanda Rae Rutherford (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.