BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL ALFSTAD,	:	
Claimant,	:	File No. 5058197
vs.	:	A R B I T R A T I O N
SECOND INJURY FUND OF IOWA,	:	D E C I S I O N
Defendant.	:	Head Note Nos.: 1803, 1803.1, 3202

STATEMENT OF THE CASE

Michael Alfstad, claimant, filed a petition in arbitration seeking workers' compensation benefits from the Second Injury Fund of Iowa (Fund) as a result of an injury he sustained on February 23, 2016 that arose out of and in the course of his employment. Claimant also alleged a first qualifying injury of January 1, 2003. This case was heard in Des Moines, Iowa on February 4, 2020 and fully submitted on March 2, 2020. The evidence in this case consists of the testimony of claimant, Joint Exhibits 1 - 8, Defendant's Exhibits AA, BB and Claimant's Exhibits 1 – 5. Claimant submitted a brief. The Fund declined to file a brief. (Transcript page 57)

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 Fund and claimant stipulated claimant had a second qualifying injury to the right lower extremity, assuming claimant proved a first qualifying injury. (Hearing Report p. 3; Tr. p. 6) The parties stipulated that any Fund benefits would commence on August 27, 2018 and the Fund is entitled to a credit for the first and second qualifying injuries of 115 weeks. (Hearing Report p. 3; Tr. pp. 6,7)

ISSUES

Whether claimant sustained a first qualifying injury on January 1, 2003, and if so;

The extent of claimant's disability for the first injury.

The extent of claimant's disability for his February 23, 2016 injury.

Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Michael Alfstad, claimant, was 47 years old at the time of the hearing. Claimant graduated from high school. Claimant did not go to college. Claimant entered and completed a four-year carpenter's apprentice program. Claimant was a union carpenter and worked as a union carpenter for over 20 years. As a union carpenter, claimant worked for a number of employers over the years. (See, Exhibit 1, p. 3) The work he did as a carpenter was similar in all of his jobs. Claimant would work overhead, use ladders and scaffolding, lift heavy weights – up to 150 pounds, was on his feet all day and would use hand and power tools.

Prior to his work as a carpenter, claimant was an assistant deli manager at a grocery store. As an assistant manager claimant would be on his feet all day and would have to carry and move trays of food. (Tr. p. 13)

In 2003 claimant began experiencing symptoms in his right wrist. On August 1 2003, Gary Jassen, D.O. examined claimant before his right wrist surgery on that same day. Dr. Jassen wrote,

> Patient is a thirty-one year-old white male with a history of right wrist pain for several months. At that time he was working at an employer called Kennedy and thought the problem came from repetitive use of the extremity, carrying lumber, cutting with shears and scissors, etc. He was treated conservatively without improvement of his symptoms and was seen by Dr. Misol, who recommended surgical release of the tendon, felt he would benefit from the procedure.

(JE 1, p. 1) On August 1, 2003, Sinesio Misol, M.D. performed right wrist surgery. On August 11, 2003, Dr. Misol said that claimant was, ". . . post tenosynovitis of deQuervain's release of right wrist on 08/01/03. He is doing well." (JE 2, p. 5) Claimant testified that he did not recall if he had any additional treatment for his right wrist. Claimant testified that he still has symptoms in his right wrist related to the deQuervain's release surgery. Claimant has numbness and has lost grip strength and strength in his right hand/arm. Claimant testified that he compensated for his right upper extremity symptoms by using his left hand/arm more. (Tr. pp. 22, 23)

On July 26, 2019, Sunil Bansal, M.D. examined claimant concerning his right wrist. Dr. Bansal stated claimant had a permanent impairment to his right wrist. Dr. Bansal wrote claimant had "Right wrist deQuervain's tenosynovitis" and was "[s]tatus post right wrist deQuervain's release." (JE 8, p. 77) Dr. Bansal assigned a two percent impairment rating using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Bansal recommended a 20 pound lifting restriction for the right hand. (JE 8, p. 78)

I find claimant has a permanent impairment as a result of his January 1, 2003 cumulative injury to his right wrist and that the extent of the impairment is two percent to the upper extremity: A two percent impairment to the right arm. The claimant credibly testified that this injury adversely affected his ability to work. This is a first qualifying injury for Fund liability purposes.

Claimant began working as a union carpenter for First Interiors Inc. (First Interiors) in February 2010. He was a working foreman for First Interiors at the time of his injury in February 2016. As a union carpenter claimant was making $30.00 per hour and with other employer contributions he was earning over $42.00 per hour. (Tr. p. 26)

On February 23, 2016, claimant was working on scaffolding and fell approximately five feet. Claimant testified that the fall caused his talar bone in his right ankle to be broken. (Tr. p. 27) Claimant went to the emergency department on that day and was referred to Daniel Miller, D.O. of Occupational Medicine for care. Claimant was then referred to Jon Gehrke, M.D. for care of his right ankle. On March 14, 2016, Dr. Gehrke's assessment was,

1. Right closed minimally displaced comminuted talar neck fracture.
2. Right knee sprain[.]

(JE 4, p. 16) On June 1, 2016, Dr. Gehrke discussed the possibility of fusion surgery with claimant; however, wanted to give the injury more time to heal. (JE 4, p. 23) On October 11, 2016, Dr. Gehrke performed his first ankle fusion on claimant. (Tr. p. 29) On February 9, 2017, Dr. Gehrke performed a second surgery on claimant's right ankle. Dr. Gehrke's post-operative diagnosis was,

> Nonunion right talonavicular joint, status post fusion attempt for post traumatic osteoarthritis after talus fracture.

(JE 4, p. 33)

> On July 26, 2017, Dr. Gehrke's assessment was,
>
> This patient is status post triple arthrodesis with redo talonavicular fusion and calcaneocuboid fusion. All fusions appear to be taking at this point. He still has some discomfort, however, particularly when he is on his feet for extended periods of time.

(JE 4, p. 54) Dr. Gehrke's recommendations were,

> Progressive weightbearing. Appropriate shoe gear. Voltaren gel. Sit-down duty only until further notice. Return to clinic in one month. I had a long discussion with Michael regarding his work options down the road. I do believe he is most likely going to be relegated to sit-down type duty given the difficulty he is having with his foot, despite the progressive

> evidence of fusion on CT scan in the hindfoot articulations. I will see him back in one month for recheck.

(JE 4, p. 54) On August 23, 2017, Dr. Gehrke noted claimant walked with a mild limp. (JE 4, p. 56) On November 29, 2017, Dr. Gehrke wrote claimant would best be served by a permanent sit-down job. (JE 4, p. 58) On January 24, 2018, Dr. Gehrke recommended permanent restrictions of permanent sit-down work only and no standing or walking. Dr. Gehrke placed the claimant at maximum medical improvement on that date. (JE 4, p. 61) On June 24, 2018, Dr. Gehrke provided claimant with a 25 percent lower extremity rating based upon the AMA Guides, Fifth Edition. (JE 4, p. 62)

On July 13, 2017, claimant was examined by Ryan Werling, D.O. for bilateral knee pain, right hip pain and low back pain. (JE 5, p. 64) Dr. Werling wrote,

> Discussed with Michael that he probably does need to get x-rays of his knee and hip as he could have had some degenerative developments given his last 18 months. Nonetheless, I believe that the right low back and right lower extremity symptoms probably could be a sciatica-like pinched nerve issue, could also be a musculoskeletal compensation injury from his abnormal gait over the last 18 months. We will get x-rays first of the hip and knee, consider an MRI of the lumbar spine to rule out any neurological cause of the pain.

(JE 5, p. 66) On September 6, 2017, Dr. Werling wrote a "To Whom It May Concern" letter which stated,

> It is my medical opinion that Michael Philip Alfstad is suffering from compensation injuries due to his original work injury on February 23, 2016. He has developed issues and complaints of left knee, lower back and right hip pain. I believe within a reasonable degree of medical certainty that Michael has an abnormal gait as a result of his right lower extremity injury.

(JE 5, p. 67)

Steven Rippentrop, M.D. of the University of Iowa Occupational Health began seeing claimant on September 29, 2017 concerning his left knee and lower back. (JE 6, p. 69) Dr. Rippentrop, in an undated letter, responded to a February 26, 2018 letter from claimant's counsel. Dr. Rippentrop stated that claimant's February 23, 2016 injury was a substantial contributing factor to claimant's development of an antalgic gait. (JE 7, p. 74) Dr. Rippentrop wrote,

> The altered mechanics of Mr. Alfstad's gait has resulted in pain in his lower back and left knee. Imaging performed by his primary care provider demonstrated degenerative changes in his hips and knee. The incident on February 23, 2016 did not cause Mr. Alfstad to develop these degenerative changes. The incident on February 23, 2016 did, however,

> result in an altered gait that caused these degenerative changes to become symptomatic. For Mr. Alfstad, these conditions include sacroiliac joint dysfunction on the right, hip pain, and left knee pain. It is my medical opinion that the incident on February 23, 2016, Mr. Alfstad caused these preexisting medical conditions to become symptomatic. The incident likely "lit up" his medical conditions or caused his medical conditions to become symptomatic sooner than it would have in the absence of the fall. This discomfort may resolve with the resolution of his antalgic gait.
>
> Dr. Gerkhe, [*sic*] the orthopedic provider caring for Mr. Alfstad's right foot, has placed him on activity restrictions of "sit down duties only" and a lifting restriction of 20 pounds[1] for his right foot. Mr. Alfstad is able to ambulate in and out of clinic with mild discomfort. I would, therefore, consider the restrictions to "Sit down duties primarily. May walk 200 feet per hour as needed." as a reasonable possibility for activity restrictions that better reflect Mr. Alfstad's capabilities.
>
> It is unclear to me whether or not Dr. Gerkhe [*sic*] has placed Mr. Alfstad at maximum medical improvement or if he will recommend physical therapy for Mr. Alfstad's altered gait. An antalgic gait, if it causes any difficulties at all, typically results in temporary exacerbations of preexisting degenerative conditions or pain muscle deconditioning. These would resolve with the resolution of the antalgic gait. If, however, Dr. Gehrke places Mr. Alfstad at maximum medical improvement and recommends against physical therapy for his foot, Mr. Alfstad's antalgic gait could potentially continue indefinitely. Dr. Gerkhe, [*sic*] as the designated provider for Mr. Alfstad's right foot, will likely provide an impairment rating and permanent restrictions once Mr. Alfstad has reached maximum medical improvement for his foot. That rating and those restrictions will likely take the altered gait and discomfort into consideration.

(JE 7, p. 74)

Claimant returned to First Interiors after he was released by Dr. Gehrke in January 2018. Claimant's employment with First Interiors was terminated on March 26, 2018 as his employer could not meet his restrictions. (Tr. pp. 33,34)

Claimant testified that with his restrictions he cannot return to work as a carpenter or in a deli. (Tr. pp. 34, 34) Claimant has earnestly looked for work since his termination from work at First Interiors. Claimant submitted over 150 applications for work. (Ex. 1, p. 8) Some, but not all, of claimant's work search is found in Exhibit 3. Claimant worked with the Iowa Department of Vocational Rehabilitation Services (IDVRS) to find employment. (Ex. 2, pp. 18 – 23)

[1] I am unable to find a report by Dr. Gerkhe in the record about a 20-pound right leg restriction.

At the time of the hearing claimant was working as a part-time teacher's assistant making $12.25 per hour with no benefits. (Tr. pp. 37, 38) Claimant is able to sit at a desk for this job. The job is only during the school year, limited to thirty-two hours per week when school is in session, with no guarantee of employment in future years. (Tr. p. 38) Claimant is also an on-call snow plow driver for the Iowa Department of Transportation (IDOT). In 2020, claimant had worked a total of 36 hours.

Claimant and First Interior reached a settlement concerning his lower right extremity injury of February 23, 2016. This settlement was fully commuted and approved by the commissioner on August 20, 2018. (Ex. BB, pp. 5 – 7) The Fund is not bound by the settlement. The claimant and employer agreed that claimant's impairment to his lower right extremity was a 25 percent impairment to his leg. The 25 percent rating is based upon Dr. Gehrke's June 26, 2018 impairment rating. (Ex. BB, p.12) There are no other impairment ratings in the record for the right leg. The Fund did not offer any evidence that differs from Dr. Gehrke's rating. I find claimant has a 25 percent impairment to his right leg.

Phil Davis, M.S. provided two vocational reports. Mr. Davis opined claimant could not return to any of his prior work with the restrictions provided by Dr. Gehrke or Charles Mooney, M.D. (Ex. 1, pp. 7, 8) Mr. Davis concluded that claimant has a 73 percent loss of his earning capacity. (Ex. 1, pp. 8, 17) Mr. Davis noted claimant had not applied for Social Security Disability and was continuing to work with the IDVRS to seek retraining.

Claimant has requested costs against the Fund in the amount of $1,855.67. The specific requests are $100.00 for the filing fee, $6.67 service fees, $1,075.00 for the cost of the vocational report and $674.00 for the cost of Br. Bansal's report. (Ex. 5, p. 45)

Claimant's testimony was consistent as compared to the evidentiary record and his demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

CONCLUSIONS OF LAW

The first issue to determine is whether claimant has proven entitlement to benefits from the Fund.

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); 15 Iowa Practice, Workers' Compensation, Lawyer, Section 17:1, p. 211 (2014-2015).

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 355 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1979).

In this case, I found that claimant proved a first qualifying injury with functional impairment and disability to his wrist.

The parties have stipulated claimant has an injury to his right lower extremity on February 23, 2016.[2] (Hearing Report p. 3; Tr. p. 6) The stipulation is not erroneous as a matter of law and will be followed. This is a second qualifying injury for Fund liability purposes.

Claimant has met his burden of proof that he has a qualifying first and second injury for Fund liability. For Fund liability the claimant's injury is considered an industrial disability whole body impairment. The Fund disputes the extent of this lower right extremity injury.

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 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).

[2] The Iowa Court of Appeals has held that this agency is to follow stipulations of the parties, unless the stipulations are erroneous as a matter of law. Indianola Cmty. Sch. Dist. v. Allen, 713 N.W.2d 247 (Iowa Ct. App. 2006).

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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Undoubtedly claimant suffered a significant injury to his left ankle due to his work accident of February 23, 2016. Claimant's relevant work history has been as a carpenter. Claimant cannot perform work as a carpenter. He has been restricted to sit-down work. Claimant cannot perform his past work in a deli. Claimant does not have the education or background to perform most desk work. Claimant has found part-time work during the school year and has also become an on-call snowplow driver for IDOT. Claimant's age and limited post-high school education are not positive factors in his labor market. Claimant has put forth a serious effort to find work, with limited success. Claimant is clearly motived to work. I find that claimant has an 80 percent loss of earning capacity. I find claimant has an 80 percent industrial disability. Claimant is entitled to 400 hundred weeks of permanent partial disability. The Fund is entitled to a credit of 115 weeks. The Fund shall pay claimant 285 weeks of permanent partial disability benefits at the stipulated commencement date of August 27, 2019.

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).

Claimant has requested costs from the Fund in the amount of $1,855.67. These costs include $100.00 filing fee, $6.67 in service costs, $1,075.00 for a vocational report and $674.00 for a report by Dr. Bansal. I decline to award claimant these costs. Iowa Code section 85.66 provides in part, "Moneys collected in the second injury fund shall be disbursed only for the purposes stated in this subchapter, and shall not at any time be appropriated or diverted to any other use or purpose." Nothing in the subchapter on the second injury fund authorizes costs. No costs are awarded to claimant.

ORDER

THEREFORE, IT IS ORDERED:

The Second Injury Fund of Iowa shall pay claimant four hundred (400) weeks of permanent partial disability benefits.

The Second Injury Fund of Iowa is entitled to a credit of one hundred fifteen (115) weeks of payment of permanent partial disability benefits pursuant to Iowa Code section 85.64.

The commencement date for payment of permanent partial disability by the Second Injury Fund of Iowa is August 27, 2019.

The Second Injury Fund of Iowa shall pay accrued weekly benefits, if any, in a lump sum together with interest. 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 percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Signed and filed this 11th day of March, 2020.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James M. Ballard (via WCES)

Meredith C. Cooney (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.