BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SUZETTE CLARK,	FILED	
Claimant,	FEB 16 2018	File No. 5062205
vs.	WORKERS COMPENSATION	ARBITRATION DECISION
SECOND INJURY FUND OF IOWA,		
Defendant.		Head Note Nos.: 3202

STATEMENT OF THE CASE

Suzette Clark, claimant, filed a petition in arbitration seeking workers' compensation benefits from the Second Injury Fund of Iowa, the defendant herein. The arbitration hearing was held on October 17, 2017. The parties filed post-hearing briefs on November 20, 2017, and the matter was considered fully submitted at that time.

The evidentiary record includes: Joint Exhibits 1 through 8; Claimant's Exhibits 1 through 6; and, Second Injury Fund's Exhibits A through G, which were admitted without objection. At the hearing, claimant provided testimony.

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.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether Second Injury Fund benefits are applicable.
2. The extent of permanent disability benefits, if any.
3. The appropriate credit applicable against any amount owed by the Second Injury Fund.
4. What is the appropriate date for the commencement of benefits payable by the Second Injury Fund?

FINDINGS OF FACT

After reviewing the evidence presented, I find as follows:

At the time of the hearing, claimant was 69 years old. She completed the 11th grade, earning C's and B's and has no additional education. (Transcript pages 10-11; Exhibit 2, p. 3) Claimant stated that she quit school because she got married, not due to any difficulty that she had with school. (Tr. pp. 10, 41, 42) Claimant presented herself at hearing as a rational and intelligent individual.

Claimant asserts a first injury to her right leg on March 6, 2009 and a second injury to her left leg on April 13, 2011. The injuries themselves are not in dispute. (Hearing Report, p. 1) Claimant was working at the Blood Center of Iowa ("Blood Center") when both injuries occurred.

Work History

Prior to working for the Blood Center, claimant worked as a waitress at a restaurant while in high school. (Tr. p. 12) From 1968 to 2000, claimant did not work outside the home. Her husband passed away in September 2000 after more than 33 years of marriage, and 2 weeks later she was employed through a temp service at UPS, loading and unloading trucks. (Tr. pp. 13-14) In 2001, claimant quit her job at UPS and began working at a Hy-Vee Bakery. She worked there for about 4 or 5 months. (Tr. p. 15) Claimant then went to work for the Blood Center in 2001. (Tr. p. 16; Ex. 2, p. 4)

Claimant testified that she did not believe she could perform any of her prior jobs in her current condition. (Tr. pp. 33-34)

At the Blood Center, claimant worked in the product management department where she packaged blood for shipment, among other things. She worked three 12 hour shifts, plus she picked up additional shorter shifts doing labeling for blood products on other days. (Tr. p. 17) Before her first injury claimant worked about 48 to 50 hours per week. (Id.) Her starting wage was about $9.25 per hour in 2001 and her wage when she was terminated in 2012 was $14.23 per hour. She testified that she was terminated in 2012 because she could no longer do her job. (Tr. pp. 17, 18; Ex. 1, p. 2) On February 20, 2012 and again on July 7, 2012, John Nettrour, M.D., claimant's treating orthopedic surgeon, stated that claimant was "permanently eliminated from her job responsibilities at the Blood Center as a result of her March 6, 2009 right knee and left hip work injury." (Ex. JE1, pp. 45, 51)

On October 16, 2012, the defendant employer sent claimant a termination letter. (Ex. 1, p. 2) The letter refers to Dr. Nettrour's July 7, 2012 opinion and states that she is terminated because of her "permanent inability to perform the essential functions of [the] position." (Ex. 1, p. 2) Claimant has not worked anywhere since that time.

First Injury – March 6, 2009

In May 2008, claimant had a right knee replacement. (Tr. p. 18) On March 6, 2009, claimant slipped and fell and landed on her right knee. She was diagnosed with an extensor mechanism injury and underwent right knee surgery in November 2009 with Dr. Nettrour. (Ex. JE1, p. 12) The injury also involved claimant's left hip, which

Dr. Nettrour opined was "most likely secondary to her markedly altered gait, secondary to her right leg loss of motion and weakness." (Ex. JE1, p. 52)

Claimant testified that she started walking with an altered gait in 2009 or 2010 and it has never returned to a normal gait. (Tr. pp. 54-55)

In 2009, claimant stopped working overtime and was placed on light duty. (Tr. pp. 23, 58-59) She never returned to full duty work. (Id.)

Around the time of her November 2009 surgery, claimant began using a cane and has continued to use a cane since then. (Tr. pp. 59-60)

After the November 2009 surgery, claimant received a handicapped parking placard and has had one since that time. (Tr. p. 62)

On October 4, 2010, claimant underwent a functional capacity evaluation (FCE) at Accelerated Rehabilitation Center. (Ex. JE2, p. 67) The FCE was considered valid and claimant demonstrated physical capabilities "between the Light and Light-Medium categories of work." (Id.) The recommended restrictions were: two handed lifting of 25 pounds from 8 inches to waist level; 15 pounds to shoulder level and 10 pounds overhead. (Ex. JE1, pp. 68, 71)

On June 8, 2012, Dr. Nettrour assigned 50 percent permanent impairment to the lower extremity for the right knee injury alone, without regard to the left hip. (Ex. JE1, p. 48)

On July 11, 2012, Dr. Nettrour stated that although claimant will have some ongoing problems with her left hip, "the severity . . . may wax and wane with ongoing therapy." (Ex. JE1, p. 52) He also stated that "I do not think that she will be fortunate enough to be entirely free of her left hip trochanteric bursitis," and assigned her seven percent impairment of the left lower extremity, which was converted to three percent of the whole person. (Ex. JE1, p. 52)

Concerning the March 6, 2009 injury, I find based upon the opinions of Dr. Nettrour that the right knee was the more significant portion of the injury when compared the left hip. This finding is supported in the October 4, 2010 FCE in which claimant demonstrated left lower extremity strength at 5/5, including measurements related to her left hip and left knee. However, her right lower extremity strength testing showed 3-/5 concerning her right knee. (Ex. JE2, p. 68) Also, claimant was noted to stand with greater weight on her left side than her right side. (Id.) I also note from the report that claimant demonstrated "no difficulty" sitting, but was only able to kneel for "20 seconds out of 3 minutes required, in which she used a pillow and did not weightbear through her (R) knee". (Ex. JE2, p. 70)

I find that the March 6, 2009 injury to claimant's right knee resulted in a 50 percent permanent impairment to claimant's right lower extremity. This is supported by the opinions of Dr. Nettrour and Dr. Bansal. (Ex. JE1, p. 48; Ex. JE7, p. 133)

The March 6, 2009 work injury involving both the right knee and left hip proceeded to arbitration hearing on July 17, 2012 and a decision was issued on September 10, 2012. (Ex. 3, p. 1) At the time of the arbitration hearing, it was Dr. Nettrour's opinion that claimant was "permanently eliminated from her job responsibilities at the Blood Center as a result of her March 6, 2009 right knee and left hip work injury." (Ex, JE1, pp. 45, 51) Following hearing the deputy awarded claimant 75 percent industrial disability for the March 6, 2009 work injury. (Ex. JE1, p. 45, 51; Ex. 3, pp. 13, 19)

On November 19, 2013, the March 6, 2009 injury again proceeded to hearing, this time on a review-reopening petition. A decision was issued on January 10, 2014. (Ex. B, p. 8) At the review-reopening hearing, claimant sought additional permanent disability benefits. Claimant argued two primary factors: (1) that her condition had deteriorated, which she claimed was supported by the more restrictive restrictions placing her in the sedentary work category in the October 19, 2013 FCE, and (2) that her termination from the defendant employer also supported a finding of increased disability. (Ex. B, p. 9) The vocational report of Phil Davis concluding that claimant was not employable was also presented in support of the claim for increased industrial disability. (Id.) In the review-reopening hearing the deputy found that the prior arbitration deputy who awarded 75 percent industrial disability "did not find or assume that claimant would continue [to work] at the Blood Center." (Ex. B, p. 9) He also noted that the deputy in the arbitration decision already found claimant to be able to work in only sedentary positions. (Ex. B, p. 10) The arbitration deputy had, in fact, found that claimant was capable of working in "service call centers or other work that allowed her to sit or stand as necessary and did not require lifting." (Ex. 3, p. 14) Therefore, it was determined that claimant had failed to show a significant change in condition and no additional permanent disability benefits were awarded. (Ex. B, pp. 10, 11)

Second Injury – April 13, 2011

On April 13, 2011, claimant was pushing a cart of frozen blood at work and had pain in her left knee. This injury is mentioned in the prior arbitration decision of September 10, 2012, but is specifically excluded from consideration. (Ex. 3, p. 12)

Claimant was sent by the employer to Dr. Nettrour, who prescribed physical therapy and obtained x-rays and an MRI. (Tr. pp. 24-25) He diagnosed a left tibial stress fracture, degenerative medial meniscal tear and osteoarthritis of the left knee. (Ex. JE1, p. 38) Claimant was taken off work on July 6, 2011 and she never returned. (Ex. JE1, pp. 38, 38; Tr. p. 25)

Dr. Nettrour noted that prior to the April 13, 2011 work injury, although claimant was developing degenerative changes, "she had been getting along fairly well" with her left knee and before the injury she "was asymptomatic." (Ex. JE1, p. 43)

Claimant continued to treat with Dr. Nettrour concerning her first and second injuries. On September 12, 2012, claimant was noted to be making changes to her home, "having different steps built into her house and she has been trying to move things to live on one floor," and she "continues to use a cane at all times to assist with

her ambulation. As for her left knee, it is becoming more painful. She has been having more trouble for [*sic*] this." (Ex. JE1, p. 53)

Claimant received a series of Orthovisc injections in her left knee in February 2013. (Ex. JE1, pp. 55, 58, 60, 61, 63) Claimant has not received any treatment for her left knee since.

Dr. Nettrour never discussed any particular impairment rating concerning the left knee, but stated "I think that definitive treatment for the left side would be knee replacement surgery." (Ex. JE1, p. 49) Sunil Bansal, M.D., claimant's IME physician, whose opinions are discussed below, agreed, stating that "[t]he end point for her condition is a left knee replacement." (Ex. JE7, p. 133)

However, claimant has not had surgery on the left knee and has not had any treatment at all for the left knee since February 2013, which is over four and one-half years before the hearing in this matter. (Tr. p. 50)

On October 19, 2013, claimant underwent an FCE at the request of claimant's counsel, which was deemed valid. (Ex. JE4, p. 81) Following the FCE, the recommended lifting restrictions were set at: five pounds from waist to floor and five pounds from waist to crown. (Ex. JE4, p. 83) The restrictions also included: front carry of ten pounds rarely; right and left carry of five pounds each on a rare basis; and, unable to crawl, crouch, kneel and use a step ladder. (Ex. 4, pp. 83-84) Claimant should also rarely do elevated work, bend forward while standing, rotate her trunk while standing, squat or use stairs. (Id.) Her capabilities were identified as falling within the "sedentary" category. (Ex. JE4, p. 82)

Comparing the October 4, 2010 FCE and the October 19, 2013 FCE, I note that in the earlier evaluation, claimant's left knee strength was rated as 5/5, while her right knee was 3-/5. (Ex. JE2, p. 68) However, in the October 19, 2013 evaluation, claimant's left knee strength was rated the same as her right knee, both of which were 3+/5. (Ex. JE4, p. 86) I also note that she continued to have no difficulty with sitting or upper extremity grip, pinching and coordination. (Ex. JE4, p. 82) This demonstrates a change in claimant's left knee condition after the second injury of April 13, 2011.

This second injury to the left leg was resolved with the employer via an agreement for settlement in the days prior to the hearing in the present matter. Claimant and the employer reached a settlement of 20 percent of the left lower extremity, or 44 weeks of permanent partial disability. (Ex. 6, p. 1)

Independent Medical Evaluations

The independent medical examinations (IME) did not occur until about four to four and one-half years after claimant's last medical treatment for her left knee in February 2013. However, I note that claimant did not work during that time and there is no alleged intervening accident or event.

On January 30, 2017, Robert Broghammer, M.D., conducted an IME and issued a report on January 31, 2017. (Ex. JE6, p. 97) Claimant testified that she was with Dr. Broghammer "maybe 15 minutes." (Tr. p. 56) Dr. Broghammer reviewed medical records going back to 1998 through February 6, 2013. (Ex. JE6, pp. 98-108) However, it does not appear that Dr. Broghammer reviewed the October 19, 2013 FCE. He reported that he conducted a physical examination including the left and right knees as well as the left hip and back. (Ex. JE6, pp. 110-111) Claimant testified that he "didn't ask to touch me, he didn't ask where I hurt, what hurt." (Tr. p. 56) Dr. Broghammer opined that claimant's work activities for the defendant employer did not cause or materially aggravate her left knee condition/complaints. (Id.) However, he did state that "but for the pre-existing condition, there would not have been any 'injury'," and that the injury was "minor in nature." (Ex. JE6, p. 111) Claimant argues that Dr. Broghammer's opinion simply does not make sense and points to the employer's resolution of the left leg claim at the full extent of Dr. Bansal's 20 percent impairment to the lower extremity as support of the lack of believability that should be tied to Dr. Broghammer's report. I find that Dr. Broghammer's opinion is not fully informed in light of the failure to consider the October 19, 2013 FCE and is confusing as he declares that the injury is not materially aggravated by claimant's work and yet also indicates that but for her underlying condition there would have been no injury as a result of the work incident. These are difficult to reconcile, as it appears that the latter is a statement that could be interpreted that the employee did sustain an aggravation of an underlying condition. I give Dr. Broghammer's opinion little weight.

On September 14, 2017, Sunil Bansal, M.D., signed an IME report following an evaluation on September 11, 2017, at the request of claimant's counsel concerning the left knee, right knee and left hip. (Ex. JE7, pp. 114, 131-134) Dr. Bansal reviewed medical records from 1998 through September 12, 2017. (Ex. JE7, pp. 114, 125) This included the FCE from October 19, 2013, Dr. Broghammer's IME report from January 2017, and bilateral knee x-rays of September 12, 2017. (Ex. JE7, pp. 124, 125, 130) He then opined that claimant's left knee condition was aggravated and lighted up by the April 13, 2011 work incident. (Ex. JE7, p. 132) He also opined that claimant reached maximum medical improvement (MMI) on February 20, 2013, which was the last date of treatment, and she sustained "20% lower extremity impairment," based on Table 17-31 of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides). (Ex. JE7, p. 133) Concerning the right knee, Dr. Bansal assigned "50% lower extremity impairment," based on Table 17-35 and 17-33 of the AMA Guides. (Id.) He also agreed with "the restrictions assigned by the valid functional capacity evaluation performed on October 19, 2013" for the bilateral knees and assigned no restrictions for the left hip. (Id.)

I accept Dr. Bansal's opinion concerning permanent impairment and restrictions for the bilateral knees as the more informed and well-reasoned opinion compared to that of Dr. Broghammer. I further accept Dr. Bansal's opinion concerning MMI for the left knee injury.

Vocational Assessments

On October 17, 2013, Phil Davis ("Davis") issued a vocational report, at the request of claimant's counsel. (Ex. 5) Davis relied on the restrictions stated in the October 4, 2010 FCE placing claimant in the "light to light medium" work category and referenced the September 10, 2012, arbitration decision awarding 75 percent industrial disability. (Ex. JE5, pp. 90, 91) He was not able to consider the October 19, 2013 FCE or resulting restrictions. He referenced the termination letter from the defendant employer which was based on her "inability to perform the essential functions of [the] position." (Ex. JE5, p. 91) He concluded that claimant's "ability to obtain or maintain gainful, competitive employment has been eliminated." (Id.) I note that Davis's report stated that it is important to consider an "individuals [*sic*] transferrable work skills" when considering the impact that an injury may have on future employability. (Ex. JE5, p. 90) However, Davis does not clearly identify or discuss claimant's transferable work skills. Also, I note that Davis was not hired to help claimant actually look for or obtain employment. (Tr. p. 47)

On September 28, 2017, Rene Haigh ("Haigh") of Encore Unlimited, issued a vocational assessment at the request of the Second Injury Fund. (Ex. JE8) Haigh reviewed the September 10, 2012 arbitration decision; Davis's vocational report; the FCE of October 19, 2013; the review-reopening decision of January 10, 2014; claimant's answers to interrogatories; medical records, and the IME of Dr. Bansal. Haigh relied on the restrictions from the October 19, 2013 FCE. (Ex. 8, pp. 137-138) She reviewed claimant's work history, education, personal/social history, and opined that claimant has "skill transferability into occupational alternatives in the competitive labor market." (Ex. JE8, p. 146) Haigh opined that claimant could perform work as an office administrative support worker, an office clerk, a receptionist/information clerk and a parking lot attendant. (Ex. JE8, p. 147) She then listed ten open jobs within these categories in her labor market survey that she described as fitting the restrictions identified in the October 19, 2013 FCE. (Ex. JE8, pp. 147-150) Haigh opined that claimant "is not precluded from all employment opportunities and has not sustained a total loss of access to pre-injury employment options." (Ex. JE8, p. 150) Haigh stated that claimant has "the work history, educational background, and residual functional capacity according to medical records reviewed to obtain and maintain employment in the labor market in occupations classified up to the SEDENTARY physical demand level." (Emphasis in original.) (Ex. JE8, pp. 150, 151)

On September 15, 2017, Davis issued a supplemental vocational report at the request of her attorney. He reviewed additional medical records including the October 19, 2013 FCE and the IME of Dr. Bansal. At that time, claimant was noted to be unemployed and receiving Social Security retirement benefits. (Ex. JE5, p. 94) Davis considered the updated medical history and the more limiting restrictions assigned in the October 19, 2013 FCE and opined "that her options for employment have been eliminated." (Ex. JE5, p. 96) In essence, Davis's opinion did not change given the fact that he believed claimant was unemployable after the first injury alone.

I find that the report of Haigh more thoroughly considers claimant's prior work history and transferable skills, and her labor market survey indicates that there are jobs available that fit within claimant's sedentary restrictions. (Ex. JE8)

Current Work Status

Claimant's termination from her employment with the defendant employer occurred through a letter dated October 16, 2012, which referred to Dr. Nettrour's opinion of July 7, 2012. (Ex. 1, p. 2) Dr. Nettrour's opinion was that claimant was "permanently eliminated from her job responsibilities at the Blood Center as a result of her March 6, 2009 right knee and left hip work injury." (Ex. JE1, p. 51) In other words, claimant's inability to perform her job for the defendant employer was, according to Dr. Nettrour and her employer, determined with consideration of her left hip injury, which is not a pleaded injury herein. This determination was also made without consideration of her left knee injury of April 23, 2011, the Second Injury Fund pleaded herein.

Claimant has not worked since October 16, 2012. She testified that she has not applied nor looked for any work. (Tr. p. 30) She stated that she did not feel that anyone would hire her. (Tr. p. 31) She testified that she liked her job and prior to her injury she planned on working there for the foreseeable future. (Tr. pp. 31-32)

Claimant testified that she earned $14.23 per hour while working for the defendant. She also worked some overtime prior to her November 2009 surgery, working 48 to 50 hours per week. (Tr. p. 17) Her hourly wage at the time of her termination multiplied by 40 hours per week is $569.20. Assuming an additional 9 hours of overtime her weekly earnings were about $569.20 plus $192.11, which is $761.31 per week. Claimant testified that she presently receives $1,526.00 per month in Social Security retirement, which converts to about $352.00 per week ($1,526.00/4.333=$352.18). She receives her husband's pension of $409.23 per month, which is about $136.00 per week. In addition she presently receives workers' compensation benefits of about $281.00 per week after attorney fees, for the March 6, 2009 work injury. Without considering the payments for the settlement of the left leg injury of April 13, 2011, claimant receives about $769.00 per week, which is about the same or more than she earned while she was employed. I also note that over one-third of the weekly income, the workers' compensation payment, is not subject to income tax. (Tr. pp. 65-67)

It is significant to the undersigned, that claimant has clearly made no effort at all to find employment. Therefore the question of whether she is unemployable as suggested by Davis has not been put to the test.

I find that claimant is not motivated to obtain employment.

Current Condition

Claimant stated that her right knee "locks up" and her left knee swells up quite often. (Tr. p. 35) She stated that she has pain and soreness in her knees and her right knee swells up as well. (Id.) Claimant testified that after the right knee replacement

and before her left knee injury, she walked three to four miles daily. (Tr. p. 36) But after the left knee injury, she now walks about one mile to one and one-quarter miles about three to four times per week and she walks a route with benches to sit and rest if she needs to. (Tr. pp. 35-36) She no longer does yard work or work in her flower beds. (Tr. p. 36)

Claimant testified that sometimes her knee pain interrupts her sleep and when this occurs she will alternate between heat and ice to soothe the pain and she will sleep in a recliner because it is easier to prop her legs up. (Tr. p. 39)

She stated that she only goes up the stairs to the second floor of her home about once a year. (Id.)

Additional Findings

After the first injury and before the second injury claimant: began walking with an altered gait that never returned to normal; began using a cane, which she continued to use through the time of the hearing; had her family move at least one bed and a dresser to the main level of her home to avoid using the stairs; and, received a handicapped parking placard, which she continued to use thereafter. I also note that the basis of her termination from employment as described by her employer was her inability to do her job as a result of the March 9, 2009 injury, which included her left hip, but not her left knee injury of April 13, 2011.

However, the second injury to claimant's left knee clearly added to her difficulties as was demonstrated in the October 19, 2013 FCE, which showed a loss of strength and reduced range of motion. (Ex. JE4, p. 86) Before the left knee injury occurred, claimant had full strength in her left knee of 5/5 and full range of motion from 0 to 130 degrees regarding extension and flexion as demonstrated in the FCE of October 4, 2010. (Ex. JE2, p. 68) The October 19, 2013 FCE showed left knee strength of 3+/5 and reduction of ranged motion to 5 degrees extension and 105 degrees flexion. (Ex. JE4, p. 86) In addition, Dr. Bansal concluded that claimant sustained a 20 percent permanent impairment to the left lower extremity due to the knee injury of April 13, 2011. (Ex. JE7, p. 133) Also, claimant testified that prior to her left knee injury, she walked three to four miles every morning, and then after the left knee injury, she could walk one mile to one and one-quarter miles on a path that had benches where she could sit and rest as needed. (Tr. pp. 35-36)

Therefore regarding the combined effects of the first and second injuries, I consider the applicable functional impairments, her physical restrictions, her medical condition before and after the injuries, her age, her education, her work experience, her lack of motivation to obtain employment, along with all other appropriate factors for the determination of industrial disability and I find that claimant has sustained 75 percent industrial disability.

CONCLUSIONS OF LAW

1. Whether Second Injury Benefits are applicable.

The first issue is whether Second Injury benefits are triggered.

Iowa Code 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 argues that Fund benefits are not triggered in this case because claimant has not proven that she sustained a valid second injury. The Fund argues that Dr. Bansal's conclusion of 20 percent permanent impairment to the left knee injury is unreliable because it was assigned over four and one-half years after claimant last received treatment for the injured knee. However, I noted above that claimant did not work between her last medical treatment for her left knee in February 2013 and the Bansal IME, nor was there any intervening cause or event. The Fund also argues that the condition supporting a finding of 20 percent permanent impairment may have been present prior to the April 13, 2011 injury. I find this is unlikely given the results of the first FCE as described above, which indicated full strength and range of motion of the left knee. I also note that both Dr. Nettrour and Dr. Bansal have suggested that knee replacement is the likely end result of the treatment for claimant's left knee injury, which also supports the conclusion that she sustained permanent impairment.

I conclude that claimant has sustained both a qualifying first injury on March 6, 2009 to her right knee and a qualifying second injury to her left knee on April 13, 2011.

2. The Extent of Permanent Disability Benefits and Applicable Credit

A. Extent of Permanent Disability

Having determined that claimant sustained a qualified first and second injury, I now turn to the extent of permanent disability.

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).

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 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.)

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, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market

without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

In the case at bar, the Fund argues that claimant's left knee injury did not result in any industrial loss beyond that attributed to her right knee alone. The Fund points out that which I have noted above that after the first injury and before her left knee injury claimant began walking with an altered gait, was using a cane, moved a bed to the first floor of her home to avoid the stairs, received a handicapped parking placard, and that her termination was due to her inability to do her job as a result of the March 9, 2009 injury, not because of her second left knee injury.

However, I note that claimant's termination as a result of the March 9, 2009 injury included consideration of her left hip, which is not considered in the present assessment of industrial disability. I also note that the clearly more significant aspect of claimant's March 6, 2009 injury was her right knee, which was more problematic in the October 4, 2010 FCE than her left hip and was assigned a significantly higher functional impairment then her left hip by Dr. Nettrour. In addition, concerning the impact of her left knee injury, claimant had clear diminution of range of motion and strength which has affected her functional ability and resulted in more restrictive restrictions in the October 19, 2013 FCE than that which existed prior to the left knee injury. I conclude that claimant has shown that the cumulative effects of both the right knee injury and the left knee injury combine to cause industrial loss greater than the loss attributable to the individual injuries.

Claimant's age, education, physical restrictions, functional impairment and limited work history among other factors suggest a high industrial disability.

However, claimant's lack of motivation to reenter the work force along with her intelligence and transferable work skills identified by Ms. Haigh suggest a reduced industrial disability.

After considering all appropriate factors for the weighing of industrial disability, I conclude for the reasons stated above, that claimant has sustained 75 percent industrial disability for the combined effect of the qualifying first and second work injuries.

B. Credit Applicable to Amount Owed by the Fund

In this case, the parties do not appear to disagree that regarding the first right knee injury, the Fund is entitled to 110 weeks of benefits based on the assessment of 50 percent permanent partial disability of the lower extremity as found by Dr. Nettrour and Dr. Bansal, the leg having a maximum value of 220 weeks under Iowa Code section 85.34(o).

It is the second injury to the left knee that the parties dispute.

Claimant asserts that the Fund is entitled to 44 weeks, which is 20 percent of the leg. This argument is based on the fact that Dr. Bansal assigned 20 percent and the claimant and the employer agreed to 20 percent in the Agreement for Settlement which was approved by this agency. (Ex. 6)

The Fund was not a party to the Agreement for Settlement and is not bound by its terms. Grahovic v. Second Injury Fund of Iowa, File No. 5021995 (App. October 9, 2009).

The Fund argues that claimant was actually paid 92.143 weeks of permanent partial disability (PPD) benefits for the left knee injury. The same is disclosed in the Hearing Report and stipulated to by the parties, although the parties also indicated at the outset of the hearing, that they disagreed about what portion of those 92.143 weeks of PPD benefits should be applied as a credit. (Hearing Report, p. 2)

Oddly, claimant now argues in her brief that only 44 weeks of the 92.143 weeks of benefits that were paid, were PPD benefits. The parties, in their respective briefs, refer to the Agreement for Settlement, which indicates in multiple locations that claimant received only 18.143 weeks of temporary benefits. This does not account for the balance of the 92.143 weeks after a reduction of 44 weeks as PPD benefits as argued by claimant. I also note that Defendant's Exhibit G, p. 40, is a check that is identified by the issuer as one week of PPD for the time period of November 20, 2014 through November 26, 2014. November 26, 2014 is 92.143 weeks from the commencement date of permanent partial disability benefits as stipulated by the parties on the Hearing Report.

The parties are held to their stipulated position in the Hearing Report that claimant has been paid 92.143 weeks of benefits for the left knee and I conclude based on that stipulation and the evidence presented that the same are, in fact, PPD benefits. The Fund is not bound by the Agreement for Settlement wherein the claimant and the employer agreed to 44 weeks. To find otherwise would award a double recovery to claimant for the period of the apparent overpayment of PPD benefits by the employer.

Therefore, I find that the Fund is entitled to a credit of 202.143 weeks, which is 110 weeks for the right knee and 92.143 weeks for the left knee.

It is understood that this award places claimant in the unique position of having more than one industrial disability award for different injuries, that when combined,

exceeds 500 weeks. However, I am not aware of any statute, rule or decision that prohibits this and none was argued by defendant.

3. Commencement Date of Benefits Payable by the Second Injury Fund

The parties agree in the Hearing Report that the commencement date for permanent partial disability benefits is February 20, 2013. Having found that claimant received 92.143 weeks of PPD benefits from the employer, I conclude that 92.143 weeks from February 20, 2013 is November 26, 2014. I therefore conclude that November 27, 2014 is the appropriate date of commencement of industrial disability benefits payable by the Fund.

Interest on accrued benefits owed by the Second Injury Fund do not begin until the date of the commissioner's order. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467, 473 (Iowa 1990).

ORDER

IT IS THEREFORE ORDERED:

Second Injury Fund shall pay claimant one hundred seventy-two point eight five seven (172.857) weeks of permanent partial disability, which is three hundred seventy-five (375) weeks less a credit of two hundred two point one four three (202.143) weeks commencing on November 27, 2014.

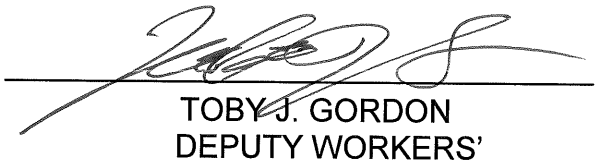
That Second Injury Fund shall pay accrued weekly benefits in a lump sum.

That Second Injury Fund shall pay interest on unpaid weekly benefits awarded above beginning on the date of this order.

That each party shall pay their own costs.

That defendant shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 16th day of February, 2018.



TOBY J. GORDON
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TJG/srs

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.