

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GREGORY WEST,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

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File No. 20001935.01

ARBITRATION DECISION

Head Note No.: 3200, 3202, 2200

STATEMENT OF THE CASE

Claimant, Gregory West, has filed a petition for arbitration seeking Workers' Compensation benefits against defendant, Second Injury Fund of Iowa (hereinafter "Fund").

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on July 9, 2021, via CourtCall. The case was considered fully submitted on July 30, 2021, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-2, Claimant's Exhibits 1, 2, 3, 5, and Defendant's Exhibits AA-II, and the testimony of claimant.

ISSUES

1. Whether claimant sustained a scheduled member loss or industrial disability;
2. Whether claimant sustained a compensatory loss to the left upper extremity on June 21, 2019;
3. The extent of claimant's industrial loss;
4. The appropriate commencement date of Fund benefits;
5. The amount of credit to which the Fund is entitled;
6. Costs.

STIPULATIONS

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 agree that the claimant was an employee at the time of the June 21, 2019, injury. The parties further agree claimant sustained a first qualifying loss to the left knee in 2008.

At the time of the alleged injury the claimant's gross earnings were \$503.00 per week. Claimant was married and entitled to four exemptions. Based on the foregoing the weekly benefit rate is \$358.46.

Defendant waives all affirmative defenses.

FINDINGS OF FACT

At the time of the hearing, claimant was a fifty-seven-year-old person. Claimant's educational history includes graduation from high school in 1982, two years of general education at the University of Northern Iowa, an associate's degree obtained from Kirkwood Community College as an orthopedic physicians' assistant, and a business administration degree obtained in 1995. (Defendant's Exhibit DD:18)

His work history includes positions as an assistant manager at a sporting goods store, an orthopedic physicians' assistant, orthopedic device salesperson, clinical specialist, and DME sales person. (DE DD:20-21) He resigned from his position with the grocery store in 2020 and is currently a cast tech for ORA.

Past medical history includes fractures to the left foot in 1984 or 1985, bilateral arthroscopic surgery on the knees in 1988 and a previous scope in the early 1990s on the left side. (JE 1:2) He had a third scope on the left knee in 2006. (DE DD:22) It is the left knee that is the basis of claimant's Second Injury Fund claim. On October 24, 2008, claimant sought care with Fred J. Pilcher, M.D., having developed clicking and popping sensations after a twisting injury. (JE 1:2) Dr. Pilcher noted he had not seen claimant for some time. (JE 1:2) Radiographs showed tricompartment disease with narrowing of the lateral joint. (JE 1:4) Surgical exploration and repair was suggested.

On November 19, 2008, claimant underwent arthroscopic examination and repair of the left knee by Dr. Pilcher. (JE 1:6-7) Claimant had a 1 cm tear at the anterior horn of the medial meniscus. The lateral femoral condyle/lateral aspect had some grade 4 changes with diffuse tears of the entire inner border of the lateral meniscus. (JE 1:6-7) The articular surface of the tibia had grade 1-2 changes. (JE 1:7) The clunking or catching sensation on the lateral joint were the abnormalities of the lateral meniscus along with the articular cartilage abnormalities on the femur and tibia. (JE 1:7) The trochlea had grade 3 changes. (JE 1:7) A post-surgical path report showed frayed fibrocartilage from the left knee shavings. (JE 1:5)

On or about April 6, 2021, claimant presented to ORA Orthopedics for an evaluation of the bilateral knees. (JE 1:17) He was seen by Megan Wulf, PA-C. (JE 1:17) He described constant pain at a level of 6 out of 10 along with grinding and swelling. (JE 1:17) Bilateral cortisone injections were administered along with recommendations for home exercise, icing, bracing and elevation. (JE 1:17-18)

Claimant complained of aches in both knees with stiffness, pain, and occasional swelling. He was not able to run or participate in sporting activities due to his knee pain.

On or about June 21, 2019, claimant was an assistant manager of a grocery store. His duties included greeting customers, assisting customers, preparing work schedules, recruiting applicants, training employees, ordering merchandise, selling merchandise, and assisting as needed. (DE CC:12) As part of his duties, he would be required to exert up to 50 pounds of force occasionally and 20 pounds of force frequently and 10 pounds of force constantly. (DE CC:13)

He was working in the back room and organizing 2 liter bottles of soda. While lifting an eight pack of bottles from a lower shelf he felt pain in his left upper extremity and shoulder areas.

He was seen by Stephanie Wilson, DNP, on June 28, 2019, for strain in the left shoulder that developed seven days ago. (JE 2:19, 21) X-rays showed mild acromioclavicular joint degenerative disease. (JE 2:20) On examination claimant exhibited tenderness and pain along with normal range of motion, no bony tenderness, no swelling, no effusion, no deformity, no laceration. (JE 2:22) He was given a referral for physical therapy. (JE 2:23) He saw small gains during physical therapy. (JE 2:26-27; JE 2:59) The pain persisted and on September 18, 2019, an MRI was ordered. (JE 2:30) An MRI scan with an arthrogram contrast was obtained on October 21, 2019 which showed a posterior superior labral tear with an intact rotator cuff. (JE 2:62)

On October 23, 2019, he was seen by Jeffery Westpheling, M.D., for a review of the MRI. (JE 2:33) After eight weeks of failed conservative therapy, claimant was referred to an orthopedic specialist for a surgical consult. (JE 2:34)

On November 13, 2019, claimant was seen by Lisa Coester, M.D., who administered a cortisone injection based on a diagnosis of left impingement syndrome with a possible tear. (JE 2:68) The injection did not improve claimant's condition and when he returned on December 2, 2019, Dr. Coester reviewed the MRI scan again and found a subtle 2 cm long posterior superior labral tear and recommended arthroscopic repair. (JE 2:71)

During the January 9, 2020, surgery Dr. Coester found a 10 percent articular tear of the subscapularis muscle and posterior, superior and anterior labral tears. (JE 2:84) Dr. Coester also found cartilage deterioration on the head of the humerus. (JE 2:84)

The postoperative course was unremarkable, and claimant was released from care as of January 11, 2021. Dr. Coester assessed a 9 percent upper extremity impairment rating for the surgery and subsequent loss of strength. (JE 2:86)

On April 5, 2021, claimant returned to ORA Orthopedics for pain at the base of his right thumb. (JE 1:19) He was diagnosed with grade 3 first CMC joint primary osteoarthritis on the right. (JE 1:19) An injection was administered. (JE 1:19) Surgery, among other therapies, was discussed. (JE 1:19)

Prior to his shoulder injury, claimant was an avid weightlifter. He attempted to resume weightlifting following his recovery but because of the pain in the shoulder has since relinquished that hobby. His current position as a cast tech requires him to lift and

hold arms and legs of patients. When possible, claimant will perform these tasks with a partner and avoid using his left arm.

Claimant continues to take daily anti-inflammatory medications.

On March 18, 2021, Farid Manshadi examined claimant for the purposes of an IME and impairment rating. (CE 1:6) During the examination, claimant exhibited reduced range of motion in the left shoulder as opposed to the right. (CE 1:7) The left knee was painful along the lateral joint line upon palpation, with a valgus tendency of the left knee while standing, and moderate swelling. (CE 1:8)

Based on a records review and examination, Dr. Manshadi concluded claimant sustained a partial permanent impairment as a result of the work injury to the left shoulder. (CE 1:8) He set the MMI date as the date of the examination, March 18, 2021, and assigned an 8 percent impairment based on the 5th Edition of the AMA Guides. (CE 1:8) Dr. Manshadi also recommended avoiding activity which required repetitious overhead activities and no lifting of more than 20 pounds overhead. (CE 1:8)

As for the left knee, Dr. Manshadi opined claimant sustained a 10 percent impairment to the left lower extremity as a result of the knee injury and resulting surgery. (CE 1:8) Dr. Manshadi recommended that claimant avoid activity which involves walking on uneven surfaces and limit stair climbing to an occasional basis. (CE 1:8)

Dr. Manshadi charged \$400.00 for the examination, \$1200.00 for the medical report and \$400.00 for the report regarding the left lower extremity. (CE 1:11) On April 20, 2021, he responded to an inquiry from claimant's counsel and maintained that the June 21, 2019, work injury permanently impacted the use of claimant's left upper extremity. (CE 1:12) He charged \$50.00 for this report. (CE 1:13)

On May 26, 2021 Dean Wampler, M.D., completed a medical record review of claimant. (DE AA:1) He concluded that the chondromalacia was not caused by any work injury but was instead a preexisting condition. He agreed the mechanism of injury as described by claimant was consistent with an injury to the labrum. (DE AA:3) He noted that while the loss of strength rating used by Dr. Coester was appropriate, the rating by Dr. Manshadi, which relied on range of motion, was the preferred method for rating the joint injury. (DE AA:4)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the

injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs “in the course of” employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

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 1970).

Parties agree that there was a first qualifying injury to the knee but dispute whether there is a second injury. There is no dispute amongst the medical professionals that the injury was to claimant's left shoulder; however the claimant argues that the impairment or loss of use is to the left arm.

Defendant Fund argues that when the code was revised in 2017, there was no provision made for the loss of a shoulder and thus there can be no second qualifying loss. Under the revised workers compensation statutes, a shoulder injury and an arm injury are separately identified scheduled injuries. Iowa Code Section 85.34(2)(m) & (n).

Other agency decisions confirm the Fund's argument. See e.g. Fernando Martinez-Rivera v. Signet Builders Inc., File No. 5064517.01, 2021 WL 4393260, at *17 (Sept. 16, 2021).

Further, impairment to an enumerated scheduled member is not enough to qualify as an injury triggering the Fund's liability. See Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 269 (Iowa 1995). In Nelson, claimant sustained pain injury to his shoulder that impaired his arm and therefore entitled him to Fund benefits. Id. at 262. The Iowa Supreme Court rejected this stating an injury that "merely affects a[n enumerated,] scheduled member" is not enough to qualify as an injury that triggers the Fund's liability. Id. at 269. The Iowa Supreme Court cited Taylor v. Pfeiffer Plumbing & Heating Co., 8 Ark. App. 144, 648 S.W.2d 526, 527 (1983) which presented the same argument as the claimant. "Even if the effects of the shoulder injury extended into his arm ..., this fact would not make the injury a scheduled one." Id. At 269-70.

While the shoulder is a scheduled member injury, it is not an enumerated one for purposes of the Fund qualifications. Similarly, a finger is a scheduled member injury but an injury to a finger does not trigger Fund benefits because it is not an enumerated body part under the fund. Stumpff v. Second Injury Fund of Iowa, 543 N.W.2d 904, 906 (Iowa 1996).

Thus, based on precedent, the correct application of the law would preclude a finding that the injury to the shoulder which resulted in impairment to the arm is a qualifying injury triggering entitlement to Fund benefits.

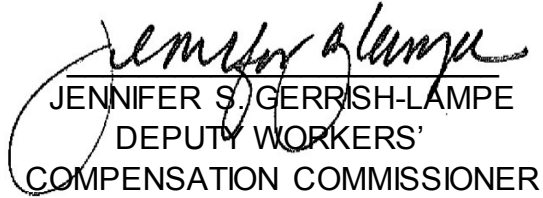
Given the above findings, the remainder of the issues are moot. Each party shall bear their own costs.

THEREFORE, it is ordered:

The claimant shall take nothing

Each party shall bear their own costs.

Signed and filed this 7th day of December, 2021.


JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nate Willems (via WCES)

Sarah Timko (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.