BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL ZENISHEK, Claimant, vs. SECOND INJURY FUND OF IOWA, Defendant.	FILED FEB 25 2019 WORKERS COMPENSATION	File No. 5049400 ARBITRATION DECISION Head Note Nos.: 1803, 3202

STATEMENT OF THE CASE

Michael Zenishek, claimant, filed a petition in arbitration seeking workers' compensation benefits from the Second Injury Fund of Iowa (Fund), as a result of a second qualifying injury he sustained on July 3, 2014, to his left leg that arose out of and in the course of his employment. Claimant asserts a qualifying first injury to his right leg based upon injury of January 9, 2001, September, 14, 2010 and February 14, 2014. This case was heard in Des Moines, Iowa, and fully submitted on September 26, 2018. The evidence in this case consists of the testimony of claimant, Claimant's Exhibits 1 – 6, Defendant's Exhibit AA and Joint Exhibits 1 - 4 and 6 - 9. Both parties submitted briefs.

ISSUES

The extent of claimant's disability.

The credit the Fund may be entitled to for the first qualifying injury.

STIPULATIONS

The parties filed a hearing report at the commencement of the 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 agreed the Fund was entitled to a credit of 81.4 weeks for the claimant's injury of July 3, 2014. The parties are now bound by their stipulations.

FINDINGS OF FACT

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

Michael Zenishek, claimant, was 66 years old at the time of the hearing. Claimant graduated from high school and earned an auto mechanics degree at a community college. (Transcript page 10) Claimant was engaged in farming from 1965 through 1998. Claimant worked manufacturing, assembling newspaper presses from 1988 through 1991. He then worked as a welder in two different jobs from 1992 through 1995. (Exhibit 1, page 1) Claimant was in the Army Reserve for 1991 through 1997. His role in the Army Reserve was vehicle maintenance. (Tr. p. 13)

Claimant began his work for Seegers Truck and Trailer Repair (Seegers) in March 1998. Claimant continued to work for Seegers until his retirement in June 2015. (Tr. p. 13) Claimant worked as a welder-fabricator at Seegers. Claimant worked on truck and trailer repairs. Claimant described the work as very physical that could involve extensive rebuilding of dump trailers and climbing ladders. Claimant said that he had to crawl and be on his knees and back to perform some of the welding. (Tr. pp 14, 15) Claimant usually worked forty-seven and one half hours a week. (Tr. p. 20) In his deposition claimant testified as to his job duties at Seegers.

> Q. Could you please describe your job duties?
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> A. Things that are rusted out, destroyed in wrecks, but mostly things that are just completely wore out that I completely take out, rebuild, put in new.
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> Q. What type of products are you rebuilding?
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> A. Well, semitrailers and like hopper trailers that haul grain and everything. Like tandems and tubes and stuff rust out in them and sometimes the whole tandem and I'll have to air arc and cut and stuff and take everything out, cut axles out and everything and just totally rebuild new subframes in tandems and stuff. And then the front of the trailer, the fifth wheel section that the tractor hooks onto, they'll rust out and start breaking up and everything, and I'll just take everything from inside completely out and build my own new system in there, frame and everything.
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> Q. What type of physical demands are required of this job?
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> A. A lot of lifting, crawling in and out underneath things, squatting, kneeling, bending.

(Ex. 2, p. 7)

Claimant testified he has had three surgeries on his right knee. On January 9, 2001, Jeffrey Nassif, M. D., performed surgery for a right knee medial meniscal tear. (Joint Exhibit 4, p. 1) Dr. Nassif indicated claimant may have injured his right knee on a ladder at work in September 2000. (JEx. 4, p.1) Claimant returned to his regular work. (Tr. p. 17) On February 25, 2002, Dr. Nassif provide claimant a 4 percent impairment rating to the claimant's right leg. (JEx. 4, p. 3)

Claimant had a second right knee injury on September 14, 2010. Claimant had surgery on his right knee for this injury on December 2010. Claimant was able to return to work. (Tr. p. 18) Claimant eventually had a total right knee replacement. This surgery was performed by Christopher Scott, M.D., on December 4, 2013. (JEx. 7, p. 1) Dr. Scott provided a 50 percent rating to the right lower extremity for this injury. (JEx. 1, p. 12) Claimant and his employer entered into an agreement for settlement of 50 percent of the lower extremity on July 22, 2015. (JEx. 1, p.1) Claimant returned to work after the right knee replacement surgery. (Tr. 34)

On February 14, 2014, claimant injured his right knee at work. His third right knee injury. Dr. Scott diagnosed this as a sprained right knee. (JEx. 7, p. 3) Claimant was returned to work with no restrictions. (JEx. 7, p. 4; Tr. p. 35) Claimant received payments for 3.141 percent to the right leg for this injury on May 22, 2015. (JEx. 1, p. 5)

On July 3, 2014, claimant tripped at work and injured his left knee. (Tr. p. 21; JEx. 5, p. 8) Claimant received treatment on November 10, 2014. Matthew White, M.D., performed a left knee arthroscopy with partial medial meniscectomy. (Tr. p. 21; JEx. 4, p. 9) Claimant returned to work without restrictions as of January 12, 2014. (JEx. 4, pp. 14, 15) Claimant continued to have symptoms in his right knee and received injections. On April 4, 2014, Dr. White noted that claimant had done well, but had a setback due to significantly increased workload going up and down a ladder for nearly a week. (JEx. 4, p. 19)

Claimant said that when he returned to work he did not have to work on ladders and was given less difficult jobs. (Tr. p. 36) Claimant continued to work for Seeger until his retirement in June 2015. Interrogatories answered by Seegers stated claimant, at the time of his retirement, was working his regular job. (Ex. AA, p. 6)

On September 28, 2015, Dr. White performed a left knee arthroscopic-assisted stabilization of medial femoral condyle microfractures. (JEx. 4, p. 33) (Tr. p. 36: Ex. AA. pp. 6, 13) Claimant initially was recommended for a partial right knee replacement. (JEx. 4, p. 45) However, claimant wanted a second opinion which he obtained at the University of Iowa Hospitals and Clinics (UIHC). Claimant saw Nicolas Noiseux, M.D., on July 12, 2017, who recommended a total left knee replacement. (Tr. p.24, JEx. 9, p. 15) Dr. Noiseux performed a total knee replacement on August 14, 2017. (JEx. 9, p. 22) Dr. Noiseux found claimant at maximum medical improvement on October 3, 2017 and said that claimant did not have restrictions. (JEx. 9, p. 25) On July 12, 2018, Dr. Noiseux provided an impairment rating of 37 percent to the left leg and stated he agreed with Dr. Taylor's, March 11, 2015 assessment of claimant's impairment. (JEx. 9, p. 40) Michael Taylor, M.D., provided a 37 percent impairment rating of claimant left leg. (JEx. 8, p. 10)

Dr. Taylor recommended restrictions of:

> Mr. Zenishek should have the ability to alternate sitting, standing and walking as needed for comfort. As far as how long he can remain in any one position prior to changing positions, it will likely depend on a multitude of factors and thus he should have the ability to change positions when needed. I recommend squatting on a rare to occasional basis as long as it is only a minimal or partial squat. Due to his bilateral knee replacements, he will not likely be able to perform a full squat. I recommend rare crawling. He can kneel on the left knee on a rare basis. However, if at all possible, he should utilize a cushion or a kneepad of some sort.
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> He can climb stairs on a rare to occasional basis although he stated that he does not have stairs at home. I recommend that he avoid climbing ladders other than a stepstool or stepladder for a couple of steps on a rare to occasional basis.

(JEx. 8, pp. 10, 11) I find these are claimant's restrictions.

Claimant testified with the restrictions that Dr. Taylor recommended he could not perform his work at Seegers or his prior employers. (Tr. p. 26).

Claimant testified that after he injured his left knee and his prior experience with his right knee claimant began to think about retirement. (Tr. p. 26) Claimant said that after his retirement at the end of June 2015 he did not look for work. (Tr. p. 27)

Claimant brings a therapy dog to the UIHC twice a week to see patients. Each visit is about two hours. (Tr. p. 28; Ex. 6, p. 1) Claimant also takes his therapy dog to a nursing home once a week. (Tr. p. 29) Claimant is able to ride a bike and walk his dog. (Tr. p. 29)

I find claimant's testimony credible that he could not perform some of the work at Seegers; especially tasks that required use of ladders, stairs, crouching or crawling. Claimant's relevant work history has required significant physical exertional and stamina and ability to use his legs. I find claimant has proven a 55 percent of loss in earning capacity.

RATIONAL AND CONCLUSIONS OF LAW

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).

Iowa Code section 85.64—provides in part:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability. 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.

Pursuant to this section, the Fund is responsible for the difference between the disability caused by the current employer and the total amount of disability.

To trigger the application of section 85.64, the employee must establish that (1) the employee has either lost, or lost the use of a hand, arm, foot, leg, or eye; (2) the employee sustained the loss, or loss of use of another such member or organ through a work related—that is, compensable—injury; and (3) there must be some permanent disability from the injuries. Anderson, 262 N.W.2d at 790. The prior loss or loss of use need not be work related. Second Injury Fund v. Neelans, 436 N.W.2d 355, 357 (Iowa 1989). Nor does the prior loss or loss of use have to be a total loss or loss of use. Second Injury Fund v. Braden, 459 N.W.2d 467, 469 (Iowa 1990).

Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 812–13 (Iowa 1994).

The Fund has argued that claimant has not proven a disability to either the right or left leg. That claimant was released to work and not provided restrictions by his various treating physicians. I find that claimant has met his burden of proof to show a first qualifying injury to the right leg and a second qualifying injury to his left leg.

Claimant has restrictions and limitations. After the right total knee replacement claimant modified how he worked. Dr. Taylor provided restrictions due to both the right and left knee injuries. Claimant received restrictions by Dr. Taylor in March 2015, shortly before he retired. Dr. Noiseux agreed with Dr. Taylor's report, even though previously he did not provide restrictions.

In Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, (Iowa 1994) the court held:

> We think what we said in a recent case adequately answers the Fund's complaint:
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> > Industrial disability means reduced earning capacity. Bodily impairment is merely one factor in gauging industrial disability. Other factors include the worker's age, intelligence, education, qualifications, experience, and the effect of the injury on the worker's ability to obtain suitable work. When the combination of factors precludes the worker from obtaining regular employment to earn a living, the worker with only a partial functional disability has a total industrial disability.
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> > . . . .
> >
> > The question is more than ... what the evidence shows [the employee] "can or cannot do." The question is the extent to which the injury reduced [the employee's] earning capacity. This inquiry cannot be answered merely by exploring the limitations on his ability to perform physical activity associated with employment. It requires consideration of all of the factors that bear on his actual employability.
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> Guyton v. Irving Jensen Co., 373 N.W.2d 101, 103, 104 (Iowa 1985) (citations omitted). Simply put, the question is this: Are there jobs in the community that the employee can do for which the employee can realistically compete? Id. at 104.

Shank, p. 815

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

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).

Total disability occurs when an injury wholly disables an employee from performing work that the employee's experience, training, intelligence, and physical capacities would otherwise permit the employee to perform. Total disability does not require a state of absolute helplessness. The pertinent question is whether there are jobs in the community that the employee can do for which the employee can realistically compete. Acuity Insurance v. Foreman, 684 N.W.2d 212 (Iowa 2004).

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319, (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Claimant has argued that he should be found to be permanently and totally disabled. Based upon the evidence present, claimant has failed to show he is permanently and totally disabled.

The restrictions provided by Dr. Taylor are not so pervasive as to preclude all types of work that claimant has skills to perform. Use of ladders, climbing, squatting and crawling are beyond his restrictions. Claimant was able to return to work at Seegers before retirement and perform work that was modified according to claimant's credible testimony.

Claimant's age is not a positive factor. He does not have significant post-high school education. Claimant has lower extremity ratings of 50 percent impairment to the right, and 37 percent impairment to the left. Considering all the factors of industrial disability, I find claimant has a 55 percent industrial disability when considering the qualifying injuries to the right and left knees.

Credit

The parties take different approaches to what credit the Fund should receive in this case. I find that the Fund's arguments follow current law. The Fund is entitled to a credit for weeks paid on the qualifying scheduled member injuries. Claimant was paid for three injuries to his right leg. The claimant was paid 4 percent for the January 2001 injury, 50 percent for the September 2010 injury and 3.14 percent for the February 2014 injury. The claimant was paid for a 50 percent left leg injury.

In Pace v. State Steel Supply Co., File No. 5025917 (App. November 9, 2010), the commissioner described on how to calculate the credit the fund is entitled to receive. That decision was based upon guidance provided in the Iowa Supreme Court case of Second Injury Fund of Iowa v. Kratzer, 778 N.W.2d 42 (Iowa 2010). As noted in the Pace appeal decision:

> The court (in Kratzer) denied the Fund a credit for the claimant's prior unscheduled low back injury and the prior scheduled left leg injury which was also a portion of the 1994 injury. As such, the total credit should be limited to the value of the separate scheduled injuries which comprise the first and second qualifying injuries. To do otherwise would provide the Fund with a credit for loss of use of a scheduled member which plays no role in the combined disability between the two qualifying injuries.

(Pace, p. 4)

The compensable value of the scheduled loss for purposes of granting the Fund credit under Iowa Code section 85.64 is the amount of the settlement when the settlement is in excess of the employer's statutory liability under Iowa Code section 85.34. Northrup v. Tama Meat Packing, 90-91 IAWC 268, 279 (Appeal 1990). See also, Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 815–16 (Iowa 1994).

When determining the Fund's liability, the trier of fact subtracts the two scheduled amounts for the first and second qualifying injuries from the full amount of the industrial disability. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 813 (Iowa 1994).

In this case, the Fund is entitled to credits for all of the right leg injuries, as well as, the left leg injury. These are the two qualifying injuries that created Fund liability. The Fund is entitled to a credit of 207.11048 weeks of benefits. With the credit, the Fund shall pay 67.889 weeks of permanent partial benefits.

The Funds obligation to pay benefits is after the employer's liability for the 37 percent left lower extremity rating has been paid. The fund shall commence payment after 81.4 weeks from October 2, 2017. [37% x 220 = 81.4]

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).

ORDER

Defendant shall pay claimant two hundred seventy-five (275) weeks of permanent partial disability benefits at the weekly rate of seven hundred sixty-three and 63/100 dollars ($706.63).

The Fund shall have a credit of two hundred seven point one, one zero four eight (207.11048) weeks.

Fund payment of permanent partial benefits shall commence as set forth in this decision.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Each party shall pay their own costs.

Signed and filed this 25th day of February, 2019.

James F. Elliott

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Robert R. Rush
Attorney at Law
PO Box 637
Cedar Rapids, IA 52406-0637
bob@rushnicholson.com

Tonya A. Oetken
Assistant Attorney General
Department of Justice - Special Litigation
Hoover State Office Building
Des Moines, IA 50319
tonya.oetken@ag.iowa.gov

JFE/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.