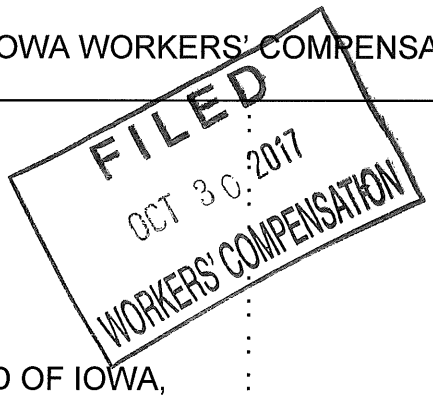
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER




| | | |
|---|---|---|
| HEATHER HOUSLEY,<br><br>Claimant,<br><br>vs.<br><br>SECOND INJURY FUND OF IOWA,<br><br>Employer,<br>Defendant. | : | File No. 5052507<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>Head Note: 3202 |

STATEMENT OF THE CASE

Heather Housley, claimant, filed a petition in arbitration seeking workers' compensation benefits from the Second Injury Fund of Iowa, defendant. The arbitration hearing was held on November 17, 2016. The parties filed post-hearing briefs on December 19, 2016 and the matter was considered fully submitted at that time.

The evidentiary record includes Joint Exhibits 1 through 9; Claimant's Exhibits 10 through 14; and, Second Injury Fund's Exhibits A through C, 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 triggered.

2. The extent of permanent disability benefits, if any.

3. What is 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?

5. Whether claimant is entitled to reimbursement under Iowa Code section 85.39.

6. Costs.

## FINDINGS OF FACT

After reviewing the evidence presented, I find as follows:

At the time of the hearing, claimant was 38 years old. At the time of the stipulated injury of November 27, 2006, claimant was divorced with four children living at home with her.

Claimant attended high school through the ninth grade and earned A's and B's. She testified that she dropped out of school to take care of her mother. She was 16 years old when she left school. She has had no additional education but testified that she planned to obtain a G.E.D. at some point in the future. However, at the time of the hearing, she had not yet taken steps to pursue her G.E.D.

In the past, claimant held a number of jobs. She worked in a laundry facility washing, drying and folding clothes and driving a truck to pick up and deliver laundry. She worked in nursing homes doing housekeeping, washing dishes, and as a dietary aide. She worked in a fast food restaurant and convenience stores. She has held positions of assistant manager and manager at convenience stores, which required her to supervise employees, order product, and handle cash receipts.

Claimant asserted a first injury to her right leg of June 25, 2005. At that time, claimant was with her family, who owned a racing car. The car was on a trailer. The car began to roll and claimant jumped partially into the car to try to put the car in gear or press the brake to keep it from rolling off the trailer. However, the car continued to roll. (Exhibit 2, page 12) Claimant testified that she struck her right knee on the fender and injured it.

Claimant received treatment for her right leg injury on June 25, 2005 at Skiff Medical Center in Newton, Iowa, and was diagnosed with a right ankle sprain. (Ex. 1, p. 1) She had a right leg x-ray, which revealed no fractures. (Ex. 2, p. 15) She was seen at the Newton Clinic on June 27, 2005, complaining of continued right leg pain. (Ex. 2, p. 12) On July 5, 2005, she had an x-ray of her right knee, which was negative. (Ex. 1, p. 2) Claimant also had treatment at Mattes Family and Sports Chiropractic, P.C.; however, the records indicate that her primary complaints while treating at Mattes Family and Sports Chiropractic, P.C., involved her neck and back. (Ex. 5, pp. 129-134) Claimant had received chiropractic treatment for her neck and back on June 21, 2005, four days prior to the alleged first injury. (Ex. 5, p. 129) About nine (9) years later, on May 5, 2014, claimant was seen at the Newton Clinic and reported that she was with friends when she was hit in her right knee, which gave out and she fell and had pain. (Ex. 2, p. 37) Claimant was placed in an immobilizer. (Ex. 2, p. 38) She had an x-ray

of her right knee on May 5, 2014, which indicated that the findings were "consistent with an effusion within the joint space visualized in the suprapatellar bursa." (Ex. 2, p. 39)

Claimant was seen by Robert C. Jones, M.D. on May 17, 2016, at the request of claimant's counsel for the purpose of an independent medical evaluation (IME) concerning both the first and second injuries. (Ex. 9, p. 183) Dr. Jones examined claimant's right leg and noted "an abnormal gait favoring the right leg." (E. 9, p. 185) He also reviewed the x-ray of claimant's right knee taken on May 5, 2014. (Ex. 9, p. 185; Ex. 2, p. 39) Dr. Jones noted that the "most prominent finding in my opinion is in the medial compartment, an approximate 3mm medial cartilage interval." (Ex. 9, p. 185) Dr. Jones concluded that claimant had "[p]ost-traumatic osteoarthritis of the medial compartment of the right knee." (Ex. 9, p. 185) He stated, "I think the osteoarthritis of the right knee particularly in the medial compartment originates with the injury of 2005. She has experienced pain in the knee since the injury with the pain getting progressively worse." (Ex. 9, p. 185) Then, based on the 3mm cartilage interval, Dr. Jones assigned a "7% loss to the leg, Table 17-31, page 544." (Ex. 9, p. 186) He stated that claimant should limit her standing and walking to no more than 30 minutes and avoid stairs and ladders. (Ex. 9, p. 186)

The stipulated work injury in the case at bar involves claimant's right arm and occurred on November 27, 2006. On that date claimant was moving crates of soda while working at Dell Oil – Horizon. She testified that her wrist popped and she had instant pain. She was 28 years old at the time of this second injury. (Ex. 3, p. 63) Claimant was seen by Dr. Quenzer, who placed her in a wrist splint. (Ex. 3, p. 64) On September 5, 2007, claimant was noted to be working full-time without restrictions, but she was avoiding lifting and was taking 800 mg of ibuprofen two times per day, which only provided slight help. (Ex. 3, p. 65) Dr. Quenzer diagnosed post-traumatic right median neuropathy, mostly at the wrist. (Ex. 3, p. 65)

On September 19, 2007, Dr. Quenzer stated that an EMG/NCS confirmed moderately severe right median neuropathy at the wrist with no denervation or other neuropathy. (Ex. 3, p. 66)

On November 5, 2007, Dr. Quenzer performed surgery which consisted of: 1) right wrist arthroscopy with limited debridement; 2) right wrist arthrography; and 3) right endoscopic carpal tunnel release. (Ex. 3, pp. 68, 94) She was noted to have post-operative neurogenic pain in the right hand. (Ex. 3, pp. 68, 94) Claimant testified that she was off work for about six weeks following surgery, after which, she returned to work at a new employer with restrictions.

On December 12, 2007, Dr. Quenzer recommended a referral to a pain management physician to address her ongoing post-operative pain in her hand/wrist. She was noted to have some evidence of chronic regional pain syndrome at that time. (Ex. 3, p. 71)

On March 17, 2008, Dr. Quenzer performed additional surgery which was: 1) open right median and ulnar neurolysis at the wrist and hand; 2) pedicle fat flap coverage of the right median nerve at the wrist; and, 3) right ulnar neuroplasty at the elbow with subcutaneous transposition. (Ex. 3, pp. 77, 96) Claimant testified that she was off work for about six to eight weeks following this surgery.

On April 24, 2008, claimant reported doing "a lot better than after the first surgery." (Ex. 3, p. 79) At that time, she was working full-time, but on light-duty. However, claimant also noted at that time that she was "having some problems with the left upper extremity." (Ex. 3, p. 79)

On July 7, 2008, Dr. Quenzer performed a left open carpal tunnel release. (Ex. 3, pp. 83, 99)

On September 18, 2008, Dr. Quenzer opined that claimant had reached maximum medical improvement (MMI) on the right upper extremity. She was told to continue to work without specific restrictions. (Ex. 3, p. 87) This was the last time claimant was seen by Dr. Quenzer. However, on May 20, 2009, Dr. Quenzer assigned three percent impairment to the right upper extremity and a zero percent impairment to the left upper extremity, "in accordance with the *AMA Guidelines.*" (Ex. 3, p. 93)

Claimant testified that her symptoms continued after her last visit with Dr. Quenzer, and she requested a second opinion and was sent to Timothy Schurman, M.D., of The Iowa Clinic, who suggested that claimant may have "some type of ligamentous injury," concerning the right wrist. (Ex. 4, p. 104)

On January 13, 2009, Dr. Schurman stated that claimant was at MMI concerning the carpal and cubital tunnel issues and had "impairment on the right hand due to some loss of strength . . ." (Ex. 4, p. 106) Relying on Tables 16-11 and 16-15, Dr. Schurman assigned a "2% impairment to the upper extremity due to the motor deficit." (Ex. 4, p. 106) Claimant was noted to be working full-time at full-duty and no restrictions were assigned. (Ex. 4, p. 106)

However, claimant had continued complaints of pain and continued to see Dr. Schurman. On February 9, 2010, Dr. Schurman believed that "it is fairly obvious that she has a compression neuropathy of the median nerve at the level of the pronator." (Ex. 4, p. 112) He then recommended a surgical release of the median nerve in the forearm and he stated his opinion that she needed a conversion of the ulnar neuroplasty at the elbow to a submuscular transposition. Surgery was then performed on February 26, 2010. (Ex. 4, p. 124)

On December 10, 2010, Dr. Schurman indicated that claimant, who was pregnant at the time, should continue with the 5 pound lifting restriction, and return after her pregnancy was completed to be reevaluated at that time.

On June 10, 2011, Dr. Schurman stated that he does not have a "good feel for Heather's pain and what is causing this." (Ex. 4, p. 123) He refers to multiple MRIs and notes that Dr. Quenzer's initial arthroscopy "did not find anything out of the ordinary." (Ex. 4, p. 123) Dr. Schurman then recommends a second opinion be obtained concerning claimant's wrist pain and that he will see her back on an as-needed basis. This was claimant's final visit with Dr. Schurman.

On October 17, 2011, claimant was seen by Ze-Hui Han, M.D., of Iowa Ortho, who recommended an arthrogram. (Ex. 8, p. 178)

On April 10, 2012, Dr. Schurman stated in a letter that he does not agree with conducting an arthrogram and that "[a]t this time, I feel she is at the point of maximum medical improvement and do not feel there is anything further that we can do to change her condition." (Ex. 4, p. 128)

On May 17, 2016, as mentioned above, claimant was seen by Dr. Jones for an IME at the request of claimant's counsel concerning both the first and second injuries. (Ex. 9, p. 183) Dr. Jones examined claimant's right hand and arm, the second injury, and found that claimant had mild numbness and tingling in the median nerve distribution with wrist flexion and tenderness and grinding of the triangular fibrocartilage complex (TFCC), as well as reduced grip strength. (Ex. 9, p. 185) Dr. Jones concluded that claimant had right carpal and cubital tunnel syndrome, with multiple surgeries and residual median nerve neuropathy, and possible TFCC tear of the right wrist. (Ex. 9, p. 185) Then, based on reduced wrist flexion and extension as well as the median nerve residuals and assessment of ongoing pain, Dr. Jones assigned a right arm permanent impairment of 9 percent, relying on Figure 16-28 and paragraph 18.3d at page 573 of the *American Medical Association Guides to the Evaluation of Permanent Impairment*, Fifth Edition (AMA Guides). (Ex. 9, p. 185) Dr. Jones assigned restrictions of lifting and carrying no more than 10 pounds occasionally, avoid frequent grasping and twisting, occasional handling and fingering, and that she should be allowed to work at a slow pace for one third of the workday and that she will need to take unscheduled breaks. (Ex. 9, p. 186)

At the time of the hearing, claimant described aching, shooting and sharp pain in her right wrist as well as numbness and tingling in her fingers. She also described significant catching that causes an increase in pain. She described difficulty doing the dishes and any activity that requires pinching or grasping with the right hand.

Considering whether Second Injury Fund benefits are triggered, I note that the employer, who is not a party in this case, paid weekly benefits to claimant, including temporary benefits and permanent partial disability benefits of 2 percent of the arm, which is five weeks. (Ex. 14, p. 140) However, there was no settlement or agency decision establishing the employer's payment obligation. (Ex. A, p. 3) Claimant readily admits in her post-hearing brief that there was no settlement or adjudication establishing the employer's liability, but argues that the same can be determined from claimant's

Exhibit 14 and the Fund's admission that claimant was paid five weeks of permanency benefits by the employer prior to the arbitration hearing.

I find that there are three different impairment ratings assigned to claimant in the records as described above, ranging from 2 percent to 9 percent. (Ex. 3, p. 93; Ex. 4, p. 106; and Ex. 9, p. 185)

## CONCLUSIONS OF LAW

The first issue is whether Second Injury Fund benefits are triggered.

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Iowa Code § 67.64 (2016). Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467, 469 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 355, 356 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300, 301 (Iowa 1970).

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) This language represents the central fighting issue in this case.

The Second Injury Fund argues that Fund benefits are not triggered in this case because the employer's obligation or has not been established. The Fund further argues that without a settlement or adjudication between the claimant and the employer, the employer's obligation cannot be established. The Fund cites Second Injury Fund of Iowa v. Braden, for the proposition that "[u]nlike ordinary workers' compensation benefits . . . the Second Injury Fund's obligation cannot be assessed until the employer's liability is fixed." 459 N.W.2d 467, 476 (Iowa 1990)(citing Iowa Code Section 85.64) The Fund also points to Eaton v. Second Injury Fund of Iowa, 723 N.W.2d 452, 2006 WL 2560854 at 4 (Iowa Ct. App. 2006), which is an unpublished decision, yet nevertheless provides guidance. The Court of Appeals in Eaton stated,

> We agree with the district court that it was the legislature's manifest intent in passing this statute to require the establishment of the employer's liability before allowing recovery from the Fund . . . Accordingly, we agree with the commissioner and district court that where, as here, there has been no prior adjudication or settlement establishing the employer's

> liability the employer is a necessary party to the employee's action against the Fund . . .
>
> Id.

In the case at bar the employer was not a party to the proceedings, there was no settlement agreement between the claimant and the employer, and there was no prior adjudication establishing the employer's liability.

The Second Injury Fund argues that based on Section 85.64 and Eaton that the establishment of the employer's obligation through adjudication or settlement is a condition precedent to triggering Fund benefits, and without such, the employer is a necessary party. Having excluded all of these things from this proceeding, the claimant's petition must fail.

Claimant argues that nowhere in the statutory language is there a stated requirement that there be a final adjudication either by an agreement for settlement or agency decision of the employers' liability. Claimant argues that the credit to be given the Fund for the employer's portion of scheduled member liability can be determined without the employer's presence in this proceeding. Further, the claimant argues that the same can be shown from the documents submitted confirming payment of weekly benefits to claimant. Claimant further argues that the Fund admits that claimant was paid five weeks of permanent partial disability benefits prior to the arbitration hearing. However, I conclude that the Fund merely admitted that claimant was paid five weeks of permanency benefits, which is not the same as stipulating to the employer's extent of liability.

However, claimant presents a well-reasoned argument that this agency allows the Fund to re-litigate the employers' liability even after an approved agreement for settlement or agency adjudication against the employer in which the Fund did not participate, because such a settlement or adjudication is not binding on the Fund. Grahovic v. Second Injury Fund of Iowa, File No. 5021995 (App. October 9, 2009). Consequently, claimant argues that if such an agreement for settlement has no preclusive effect on the Fund and employer liability can be re-determined without the presence of the employer, then the employer's presence in this case should not be necessary.

However, from my review of Eaton and Braden, the issues and arguments in Eaton are quite similar to those presented in this case. The Court dealt with the same provision in Iowa Code section 85.64 and the issue of whether or not an employer is an indispensable party to a Second Injury Fund claim in the absence of an approved agreement for settlement. In that case, the Court agreed that the extent of the employer's liability must be fixed or established before an award can be made against the Fund. The Court noted that the employer was in the best position to defend against a liability claim against it.

Whether or not an unpublished decision of the Court of Appeals is binding on this agency or the undersigned, the agency appeal decision that was sustained by the Court of Appeals in Eaton is binding on this deputy. I am unaware of any more recent agency precedent on this issue. Although it can be argued that this agency precedent is no longer valid given the more recent decision in Grahovic, whether or not a prior agency precedent should be overruled is a decision reserved for the workers' compensation commissioner, not a deputy commissioner absent specific delegation to do so.

Claimant further argues that the Fund's answer does not allege as a defense that claimant's petition is defective and that the Fund has therefore waived this argument. However, I conclude that it is the responsibility of claimant in a claim against the Fund to show the compensability of the work injury and the liability of the Fund in excess of the liability of the employer and therefore reject this argument.

Therefore, I conclude that claimant has failed to carry her burden of proof that the Fund benefits are triggered having failed to produce a prior agreement for settlement or adjudication concerning the claimant and the employer and in the absence thereof, having failed to include the employer as a necessary party in this litigation.

As a result of the above conclusion, the remaining issues are moot.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I concluded that each party shall pay their own costs.

ORDER

IT IS THEREFORE ORDERED:

1) Claimant shall take nothing.

2) Each party shall pay their own costs.

Signed and filed this 30th day of October, 2017.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Steven C. Jayne
Attorney at Law
5835 Grand Ave., Ste. 201
Des Moines, IA 50312
stevejaynelaw@aol.com

Amanda R. Rutherford
Assistant Attorney General
Dept. Justice
Hoover State Office Bldg.
Des Moines, IA 50319
amanda.rutherford@iowa.gov

TJG/sam

**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.