

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RAEANN ASHLEY,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

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File No. 5067349

ARBITRATION DECISION

Head Note Nos.: 1402.40, 3202, 3203

STATEMENT OF THE CASE

Raeann Ashley, claimant, filed a petition in arbitration against defendants, Unity Point Health – St. Luke’s Hospital, self-insured employer. Ms. Ashley also asserted a claim against the Second Injury Fund of Iowa in this file. Prior to hearing, claimant and the employer reached an agreement for settlement that resolved the pending claims against the employer. Claimant proceeded to hearing against the Second Injury Fund of Iowa (“the Fund”).

This case came before the undersigned for an arbitration hearing on March 27, 2020. The case was scheduled to be an in-person hearing in Des Moines, Iowa. However, on March 13, 2020, in an effort to help mitigate the spread of the novel coronavirus (COVID-19), the Iowa Workers’ Commissioner issued the order, In the Matter of Coronavirus/COVID-19 Impact on Hearings. (Available online at: <https://www.iowaworkcomp.gov/order-coronavirus-covid-19> (last viewed June 22, 2020)). The order amended the hearing assignment order in each case before the Commissioner scheduled for an in-person regular proceeding hearing between March 18, 2020, and June 16, 2020. The amendment made it so that such hearings were held by Internet-based video, using CourtCall, unless a motion to continue the hearing was filed under Rule 876 IAC 4.23. As no such motion was filed in this case, the proceedings to place via live video hearing using CourtCall, with all participants appearing remotely from separate physical locations. The hearing proceeded without significant difficulties.

The evidentiary record in this case includes joint exhibits 1 through 14, claimant’s exhibits 1 through 5, and defendant Second Injury Fund’s exhibits AA through KK. Claimant testified on her own behalf. The Second Injury Fund did not call any witnesses to testify live at hearing.

The evidentiary record closed on March 27, 2020, at the end of the hearing. The parties were given until April 24, 2020 to file post-hearing briefs, at which time the case was considered fully submitted.

ISSUES

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a prior qualifying loss to the left arm on November 23, 1987.
2. If so, the extent of functional loss to the left arm.
3. The extent of claimant's industrial disability, if any, as a result of the combined effects of the alleged injury.
4. If benefits are awarded, the commencement date for same.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, Raeann Ashley, is a 38-year old, left-hand dominant woman. Ms. Ashley currently lives in Palatine, Illinois, a town of about 68,000 people. Ms. Ashley grew up in California, and graduated from Serrano High School in 2000. After high school, she took computer programming courses at San Bernardino Community College and Victor Valley College. She also attended Fresno City College for two years. Ms. Ashley eventually earned her bachelor's degree in child development from Ashford University. (Testimony; Exhibits AA, BB)

Since graduating from high school, Ms. Ashley has held a number of jobs. She worked as a ski lift operator from approximately 2000 to 2008, which involved helping people on and off of ski lifts and shoveling snow. Ms. Ashley has also worked as a cashier at a variety of retail stores and gas stations, as well as casinos and movie theaters. She also spent time working as a janitor, and as a production worker on an assembly line. She worked for a time for a freight company, loading and unloading semi-trucks, and also ran an in-home daycare. From 2010 to 2015, Ms. Ashley did not hold a paying job, but testified that she spent some of her free time volunteering for the Army National Guard. (Testimony; Claimant's Exhibit 1, p. 1-3)

In March of 2018, Ms. Ashley began working as a housekeeper for St. Luke's Hospital in Cedar Rapids. Part of the application process involved passing a pre-employment physical, which required her to lift 30 pounds three times, and carry a 20-

pound bag for 50 feet, twice. (Joint Exhibit 2, p. 2) Ms. Ashley completed those tasks and the remainder of the physical with no issues. Id. Ms. Ashley's work hours were from 6:00 p.m. until 2:00 a.m. She testified that she prefers working second or third shift hours due to child care needs. She homeschools her children, and has since they were born. (Ex. BB, p. 14; Deposition Tr., 45:20-25) Ms. Ashley and her children also belong to a homeschool group, which meets once a week for group activities and also takes field trips to various places. (Testimony)

Ms. Ashley's job duties as a housekeeper at St. Luke's involved cleaning patient rooms, including light switches, walls, fixtures, beds, and under beds. She was also required to sweep and mop floors, and clean bathrooms. (Testimony; CE 4, p. 27) Ms. Ashley sustained an injury to her left knee arising out of and in the course of her employment on August 31, 2018. (CE 3, p. 11) The injury occurred when Ms. Ashley turned while lifting a mattress, causing her left knee to pop and buckle. (Testimony, JE 3, p. 18) The claim was accepted by the employer, and Ms. Ashley initially received conservative treatment, including physical therapy. (JE 3, 4, 5) When that did not resolve her issues, she was referred to Kyle Switzer, M.D., who performed a partial lateral meniscectomy surgery on October 29, 2018. (JE 7, p. 42-43) At a follow up visit on November 13, 2018, Dr. Switzer indicated Ms. Ashley could return to work with light duty restrictions, and she testified that in December of 2018 she was transferred from housekeeping to patient registration. (Testimony; JE 7, p. 44) Dr. Switzer placed Ms. Ashley at maximum medical improvement and released her to return to work with no restrictions on January 2, 2019. (JE 7, p. 45-46) Dr. Switzer later provided an impairment rating of two percent of the left lower extremity. (JE 7, p. 49)

Ms. Ashley remained in the patient registration position until June 3, 2019, at which time she was terminated from employment. (Ex. CC, p. 16) According to a letter from her employer, Ms. Ashley was terminated due to "incidents of misconduct" in which she was "insubordinate, demonstrated a failure to follow FOCUS values, and exhibited behaviors in front of patients that were detrimental to hospital operations." Id. At hearing, Ms. Ashley testified that she had some issues with her supervisor, and was fired after filing a complaint. (Testimony) Following her termination, Ms. Ashley was unemployed until December of 2019. She did apply for several jobs during those months, most of which were cashier positions. (Testimony; Ex. BB) Ms. Ashley testified that she believes she is physically capable of performing every job for which she has applied. (Testimony)

In December of 2019, Ms. Ashley applied and was hired for a job with a grocery delivery service called Shipt. (Testimony, Ex. BB, Depo. Tr. p. 12:2-10) Ms. Ashley described that she had to download an app onto her phone, which then notifies her when there is a delivery request in her area. She can then decide whether to accept or decline the order. If she accepts the order, she travels to the grocery store and completes the shopping, and then delivers the groceries to the customer at their home. (Testimony) Since December of 2019, Ms. Ashley has only accepted two delivery orders through Shipt, for which she was paid \$18.00 each. She testified that there had only been two orders in her area. She further testified that at the time of hearing she

was not aware as to whether the Shipt app was still on her phone, or whether there were any current requests for delivery in her area. (Testimony) She has not taken an order since January of 2020. According to the job description for Shipt, the company requires the ability to lift up to 40 pounds. (Ex. DD, p. 20) Ms. Ashley testified that she believes this requirement was added in February of 2020, in response to the COVID-19 pandemic. (Testimony)

For Second Injury Fund purposes, Ms. Ashley has alleged a first qualifying injury to her left arm, which she believes occurred on November 23, 1987, when she was five-years old. (Testimony; Ex. BB, p. 10, Depo. Tr. p. 27:14-28:3) Ms. Ashley testified that at the time, she was playing a game of hide-and-seek with her sister and she hid behind a door. During the game, her left arm and hand were “smashed” in the door. Ms. Ashley was taken to Good Samaritan hospital in Bakersfield, California, where it was determined that her arm was broken, and she was placed in a cast. Id. When records were requested from the hospital, Ms. Ashley was informed that records are purged after ten years, but Good Samaritan confirmed that she was seen at the hospital one time on November 23, 1987. (JE 13, p. 69) Ms. Ashley testified at her deposition that she had not had any treatment for her left arm since 1987. (Ex. BB, p. 10, Depo. Tr. p. 28:13-29:2) At hearing, she testified that she could not remember any additional treatment beyond the cast. (Testimony) There are no medical records in evidence that indicate any treatment to her left arm at any time since 1987.

Ms. Ashley is left-hand dominant. At hearing, she testified that when she was younger, if she complained about her left arm hurting, her mother would smack her on the back of the hand with a ruler, so she learned to stop complaining. She further stated that she thought her left hand was “normal” until sometime in 2019. Ms. Ashley testified that currently, she has trouble plugging things into GFI outlets with her left hand, that she has trouble throwing balls, and that her handwriting is “terrible.” (Testimony)

Ms. Ashley had an independent medical evaluation (IME) with Sunil Bansal, M.D., M.P.H. on January 22, 2020. (CE 4) Dr. Bansal noted that Ms. Ashley continues to have pain in her left knee, and difficulty with stairs as her knee tends to give out on her. (CE 4, p. 27) Ms. Ashley also told him that she can stand or walk for one hour before resting, and that her left knee swells intermittently. She also advised that she cannot kneel, squat, or run. Id. With respect to her left arm, Ms. Ashley advised that she continues to have pain with pronation and supination, that she has difficulty writing, and that she has pain in the area of the ulna into her fifth finger. Id. She further stated that her left wrist is weak, so she carries everything with her right hand, and that she cannot carry more than ten pounds. (CE 4, p. 27) Dr. Bansal agreed with Dr. Switzer’s two percent lower extremity impairment rating, but recommended permanent restrictions of no frequent kneeling or squatting, and avoiding multiple stairs. Id. at 29-30. With respect to her left upper extremity, Dr. Bansal provided a two percent upper extremity impairment rating, and recommended restrictions of no lifting more than ten pounds with the left hand. Id. at 29-30, 32.

Following receipt of Dr. Bansal's IME report, the Second Injury Fund asked Joseph J. Chen, M.D., to perform a review of the medical records and provide an opinion. (Ex. EE) Dr. Chen also reviewed Ms. Ashley's deposition testimony and answers to interrogatories. Id. at 21. Dr. Chen disagreed with Dr. Bansal's recommendation of no lifting more than ten pounds with the left arm. Id. at 23. Dr. Chen noted that the medical records indicate that Ms. Ashley's left forearm injury occurred when she was five-years old and healed with no permanent sequelae. As such, he stated it is "illogical to assign permanent restrictions for an injury that occurred during childhood that did not lead to any long-term physical disability or limitation." (Ex. EE) He noted that Ms. Ashley was able to participate in usual recreational activities, hold gainful employment positions "requiring high level manual dexterity," and did not report any left arm symptoms when she saw physicians for other musculoskeletal conditions in 2010, 2015, 2018, and 2019. Id. He also noted that she reported no treatment for her left arm since 1987, which is supported by the lack of medical records indicating any complaints or treatment for her left arm. Id. As such, Dr. Chen opined that no permanent restrictions are needed with respect to Ms. Ashley's left arm. Dr. Chen further noted that Ms. Ashley "most certainly" would have exceeded Dr. Bansal's suggested ten-pound lifting restriction in her past occupations, including while working at St. Luke's as a housekeeper. (Ex. EE, p. 24) She was also found fit for duty prior to starting the housekeeper position, with no restrictions to her left arm. Id. Finally, with respect to her left knee, Dr. Chen agreed with Dr. Switzer's assessment that no permanent restrictions were necessary. Id.

I find Dr. Chen's opinion to be far more convincing than that of Dr. Bansal. Dr. Bansal provided no basis for his recommended work restrictions, and his opinion is simply not supported by the remainder of the evidence. Ms. Ashley was able to work in a variety of jobs with full use of both arms for her entire adult life, despite her alleged difficulties with her left arm. She has never worked under the ten-pound lifting restriction that Dr. Bansal recommended. In fact, her most recent position with Shipt requires the ability to lift up to 40 pounds. It is unclear whether that requirement existed prior to February 2020, but it is logical to assume that a person delivering groceries would need to be capable of lifting any item commonly found in a grocery store. Further, Dr. Bansal does not address the fact that Ms. Ashley has had no medical care related to her left arm since 1987, and it is never mentioned in the history of any of her other medical records. Dr. Chen discussed these issues, and concluded that no permanent restrictions are needed for Ms. Ashley's left arm, and that her injury in 1987 healed with "no permanent sequelae." The greater weight of evidence supports Dr. Chen's conclusions.

In addition, Dr. Bansal's impairment rating for the left arm does not comply with the requirements of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. His impairment rating is based on a perceived range of motion deficit in her left arm, but his report does not contain any information regarding range of motion measurements with respect to her uninjured right arm. The Guides note that when determining impairment due to abnormal motion, it is important that both extremities are compared, as people can have lesser or greater joint flexibility than average. (Ex. KK, p.

48) No such measurements with respect to Ms. Ashley's right arm are noted in Dr. Bansal's report, and as such, I do not find his rating to be reliable. I find that Ms. Ashley has not met her burden to prove that she sustained a first qualifying injury for purposes of her claim against the Fund.

The parties also submitted vocational evaluations. (CE 5; Ex. HH) Having found that Ms. Ashley did not prove a first qualifying injury for Fund purposes, the extent of industrial disability is moot. Therefore, the vocational evaluations are of little assistance.

CONCLUSIONS OF LAW

Ms. Ashley has resolved the left knee claim with her employer on an agreement for settlement basis, for 2 percent of the left lower extremity. (CE 3) This case involves a claim for Second Injury Fund benefits.

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).

The Fund disputes whether claimant has proven a first qualifying injury to her left arm. It is the claimant's burden to prove entitlement to the benefits sought by a preponderance of the evidence. 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). In this case, the evidence does not meet that standard with respect to the alleged first injury to Ms. Ashley's left arm.

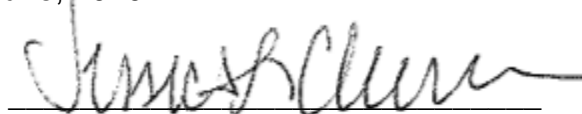
There are no medical records in evidence documenting the injury to Ms. Ashley's left arm. While I do believe that the injury occurred, there is nothing to explain the severity of the injury or her recovery process. I found Dr. Chen's opinion that the 1987 injury healed with no permanent sequelae to be most convincing. Ms. Ashley's work history and the lack of any treatment or even mention of ongoing left arm issues in her medical records support his opinion. Ms. Ashley has not met her burden to prove that she lost the use of her left arm due to the injury that occurred in 1987 when she was five-years old. Because Ms. Ashley has failed to prove a qualifying first injury, she is not entitled to benefits from the Second Injury Fund of Iowa. Therefore, the remaining issues regarding the extent of permanent disability are moot.

ORDER

IT IS THEREFORE ORDERED that claimant takes nothing from the Second Injury Fund of Iowa.

The parties shall pay their own costs.

Signed and filed this 26th day of June, 2020.



JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Randall Schueller (via WCES)

Amanda Rutherford (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.