

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LYNN MEYER,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Insurance Carrier,
Defendants.

File No. 5068616

ARBITRATION DECISION

Head Note Nos.: 2907, 3202

STATEMENT OF THE CASE

Lynn Meyer, claimant, filed a petition for arbitration against Trinity Health Corporation d/b/a MercyOne Dubuque Medical Center (hereinafter referred to as "MercyOne") and asserted a separate claim against the Second Injury Fund of Iowa. Claimant reached a settlement agreement with the employer prior to the scheduled hearing in this case and an agreement for settlement has been filed with this agency. The Iowa Workers' Compensation Commissioner has approved the agreement for settlement between claimant and the employer. Administrative notice of that agreement for settlement is taken.

The case against the Second Injury Fund of Iowa came before the undersigned for an arbitration hearing on December 2, 2020. Due to the ongoing pandemic in the state of Iowa and pursuant to an order of the Iowa Workers' Compensation Commissioner, this case was tried using the CourtCall videoconference platform.

The parties filed a hearing report before the scheduled hearing. On the hearing reports, 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 evidentiary record includes Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 5, Employer's Exhibit B¹, and Second Injury Fund Exhibits AA through II.

Claimant testified on her own behalf. The Second Injury Fund called Courtney Veach, the employee health coordinator at MercyOne, to testify. No other witnesses

¹ Although the employer was not present or participating in the hearing, the Second Injury Fund requested that the employer's Exhibit B be received into evidence.

testified at the hearing. The evidentiary record closed at the conclusion of the December 2, 2020 hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on January 25, 2021. The case was considered fully submitted to the undersigned on that date.

STATEMENT OF THE ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether Ms. Meyer sustained a prior qualifying loss to the right leg in 1995 for purposes of the Second Injury Fund claim.
2. The extent of claimant's permanent functional loss, if any, as a result of the alleged 1995 right leg injury.
3. Whether claimant sustained a compensable and qualifying loss to the bilateral upper extremities as a result of a work injury on December 13, 2017.
4. The extent of claimant's permanent functional loss, if any, as a result of the alleged December 13, 2017 work injury.
5. The extent of industrial disability, if any, sustained as a result of the first and second qualifying injuries.
6. The extent of the credit to which the Second Injury Fund of Iowa is entitled pursuant to Iowa Code section 85.64.
7. Whether costs should be assessed against the Second Injury Fund of Iowa and, if so, in what amount.

FINDINGS OF FACT

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

Lynn Meyer was 65 years of age at the time of the arbitration hearing. She is married and resides in Asbury, Iowa. She worked as a registered nurse from 1975 through the date of her retirement in May 2019. Her nursing license has since lapsed. (Claimant's testimony)

Ms. Meyer alleges she sustained a work injury on December 13, 2017. Specifically, she asserts that she sustained bilateral carpal tunnel syndrome as a result of her cumulative work activities. Ms. Meyer required bilateral carpal tunnel surgery for these injuries. She resolved the December 13, 2017 injury claim with the employer.

The Iowa Workers' Compensation Commissioner has approved an agreement for settlement between claimant and the employer.

In addition, Ms. Meyer alleges a claim for benefits against the Second Injury Fund of Iowa. In the hearing report, Ms. Meyer alleges an initial qualifying injury to the right knee or leg in 1995. The sole claim before the undersigned at this time is Ms. Meyer's claim for Second Injury Fund benefits.

During her nursing career, Ms. Meyer worked as an operating room nurse. Her position required her to perform physical manual labor, such as positioning patients that were under anesthesia. She testified that both of her knees and her hands started hurting in the 1990s as a result of this physical work. She described pain while walking as a result of her knees in this time frame. (Claimant's testimony)

In October 1995, Ms. Meyer sought evaluation of her right knee by an orthopaedic surgeon, Scott P. Schemmel, M.D. Dr. Schemmel initially diagnosed her with a probable right knee medial meniscal tear and a proximal tibial bone lesion in the left knee. (Joint Exhibit 6, pages 32-33) Dr. Schemmel ordered an MRI of the right knee. The MRI did not reveal the suspected tear of the medial meniscus in Ms. Meyer's right knee. (Joint Ex. 6, p. 35) However, Dr. Schemmel did note the right knee MRI demonstrated some "degenerative changes in the posterior horn of the medial meniscus." (Joint Ex. 6, p. 33)

Ms. Meyer testified that she was told she had arthritis in her knees in the 1995 time frame. However, an x-ray of the right knee taken on October 25, 1995 demonstrated normal joint space. (Joint Ex. 6, p. 31) Dr. Schemmel released claimant without ongoing medical care for the right knee.

Ms. Meyer testified that she would often informally consult an orthopaedic surgeon, Judson Ott, M.D., with regard to her ongoing right knee symptoms. She testified that Dr. Ott would perform a physical examination of the claimant's knees in empty operating rooms while she was working at the hospital. However, Ms. Meyer sought no further formal medical treatment for her right knee until 2010. Apparently, nothing identified during Dr. Ott's informal assessments or examinations warranted him to recommend more formalized evaluation, diagnostic testing, or intervention. (Claimant's testimony)

Dr. Ott formally examined Ms. Meyer in 2010. At that time, he recommended x-rays of her knees. The January 5, 2010 x-rays demonstrated "[n]ormal joint space both knees" and concluded claimant had a "normal right knee." (Joint Ex. 6, pp. 37-38) Dr. Ott re-evaluated Ms. Meyer in April 2010 noting that the January 2010 x-rays were "normal on the right side." Dr. Ott opined that claimant's x-rays, examination and history "are most consistent with patellofemoral arthrosis, although relatively mild at this time." (Joint Ex. 6, p. 41) Dr. Ott recommended physical therapy to develop a home exercise program and a return evaluation in one year. (Joint Ex. 6, p. 41)

Ms. Meyer testified that she has ongoing right knee symptoms. She testified that she has difficulties with stairs, requiring the use of hand railings when she traverses stairs. She testified that she has decreased motion in her right knee and that pain comes and goes primarily with activity in her right knee. She testified that she does not feel the right knee is stable and explained that her knee symptoms would increase as she stood during work. Ms. Meyer testified that she requires the use of Advil every night to permit her to sleep due to symptoms in both her hands and both her knees.

Ms. Meyer also testified that she has difficulties working outside or walking on hills because of her knees. She avoids bending, squatting, and testified she can no longer do Jazzercise because of her knees. She described difficulties doing laundry because the laundry area in her house is in the basement and she struggles walking the stairs. Ms. Meyer also testified that she is no longer able to ride a motorcycle because she cannot get on and off the motorcycle due to the symptoms in her knees.

However, Ms. Meyer did not seek any additional treatment for her right knee between April 2010 and the alleged December 13, 2017 work injury. Ms. Meyer conceded on cross-examination that no physician placed work restrictions on her as a result of her right knee condition prior to December 13, 2017. She conceded that Dr. Ott did not prescribe the use of any medications or braces after his informal knee examinations. Ms. Meyer also conceded that she continued to work full duty as an operating room nurse throughout this time period and until the December 13, 2017 work injury. In fact, Ms. Meyer conceded that she did not have any permanent restrictions for her right knee even at the time of her retirement in May 2019.

Subsequent to the work injury, Ms. Meyer sought evaluation for her left knee in July 2018. (Joint Ex. 7) In February 2019, claimant's treating orthopaedic surgeon, Ryan P. Cloos, D.O., re-evaluated Ms. Meyer after arthroscopic surgery on her left knee and noted, "She is also having right knee pain now." (Joint Ex. 7, p. 47) This record suggests that Ms. Meyer was not reporting or experiencing right knee pain prior to approximately February 2019. Certainly, she had not sought any treatment for the right knee since 2010. Ultimately, Ms. Meyer submitted to a total knee replacement on the left knee but did not have ongoing right knee treatment at the time of hearing.

Claimant sought an independent medical evaluation, performed by Mark C. Taylor, M.D., on September 23, 2019. Dr. Taylor evaluated Ms. Meyer's right knee as part of that examination. His diagnosis for the right knee was chronic knee arthralgia, noting that claimant had a previous diagnosis of patellofemoral arthrosis and osteoarthritis. (Claimant's Ex. 2, p. 10)

Dr. Taylor was asked by claimant's counsel to provide a permanent impairment for her right knee. Dr. Taylor opined that there were two potential ways to offer permanent impairment for Ms. Meyer's right knee using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He opined that Ms. Meyer sustained a two percent right lower extremity impairment as the result of patellofemoral-related pain. Specifically, Dr. Taylor utilized Table 17-31 on page 544 of the AMA Guides, Fifth

Edition. He specifically referenced the footnote under Table 17-31 as the basis for his impairment rating of the right knee/leg. (Claimant's Ex. 2, p. 12)

In the alternative, Dr. Taylor opined that another option for rating impairment of the right knee would be based upon a diagnosis of osteoarthritis. He opined that claimant had arthritis in the right knee that pre-dated the December 13, 2017 work injury, stating, "the OA of her knees was more than likely present before her work injury." (Claimant's Ex. 2, p. 12) However, Dr. Taylor acknowledged, "Because x-rays were not obtained in the year or two prior to her work injury, I am unable to assign a specific impairment value as pertains to her OA of the knees . . . because exact measurements of the joint space (prior to her work injury) are not available." (Claimant's Ex. 2, p. 12)

Dr. Taylor's opinion is accurate that x-rays were not taken of the right knee within the year or two prior to the work injury. During that period of time, Ms. Meyer was not seeking any medical treatment for her right knee and continued working full duty as an operating room nurse. The most recent x-ray of her right knee was in 2010 and, as noted above, demonstrated normal joint space. Accordingly, I accept Dr. Taylor's opinion and concession that it is not possible to offer an opinion or permanent impairment related to claimant's right knee arthritis prior to the December 2017 work injury.

The Second Injury Fund challenged Dr. Taylor's permanent impairment rating of the right knee. It requested that Joseph Chen, M.D., a physiatrist, perform a medical record review and comment upon Dr. Taylor's assignment of permanent impairment of the right knee. Dr. Chen noted that claimant sought treatment for her right knee in 1995 and again in 2010. He opined that claimant's clinical findings in 2010 were "consistent with mild patellofemoral arthrosis." However, he noted that claimant's symptoms did not appear to limit her ability to function in her work or recreational activities in 2010. He opined that the findings and symptoms identified in 2010 "would not lead to any objective impairment."² (Second Injury Fund Ex. GG, p. 29)

Perhaps most directly to the dispute in this case, Dr. Chen reviewed the permanent impairment rating offered by Dr. Taylor and questioned the validity of that impairment rating under the AMA Guides, Fifth Edition. Specifically, Dr. Chen opined:

Dr. Taylor also stated in his report that "she did not sustain direct trauma to the knee" yet assigned a rating according to the footnote under Table 17-31[,] page 544 of the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition.

² It is acknowledged that Dr. Chen refers to the left knee when corresponding medical records suggest treatment and findings were related to the right knee. It is found that these references by Dr. Chen are typographical errors and likely caused by a typographical error in the question posed by Second Injury Fund counsel to Dr. Chen. I do not find these typographical errors to be significant enough to disregard Dr. Chen's opinions in their entirety, but they are considered when assessing credibility.

. . .

I am unable to follow the rationale that Dr. Taylor used to assign Ms. Meyer a 2% impairment of the knee due to her patellofemoral knee arthritis as she specifically denied any direct trauma to the knee.

Therefore, it is my medical opinion that Ms. Lynn Meyer did not have a ratable permanent impairment for her [right] knee pain before her December 2017 work injury.

(Second Injury Fund Ex. GG, p. 30)

The footnote that Dr. Taylor relies upon to award a two percent permanent impairment provides, "In an individual with a history of direct trauma, a complaint of patellofemoral pain, and crepitation on physical examination, but without joint space narrowing on x-rays, a 2% whole person or 5% lower extremity impairment is given." AMA Guides, Fifth Edition, Table 17-31, page 544 (footnote).

During his September 23, 2019 examination, Dr. Taylor identified crepitation in Ms. Meyer's right knee. (Claimant's Ex. 2, p. 10) However, review of Dr. Schemmel's October 25, 1995 evaluation demonstrates he performed a thorough evaluation of the right knee. His note does not document any crepitation in the right knee. (Joint Ex. 6, p. 32) Similarly, review of Dr. Ott's April 6, 2010 examination documents no evidence of crepitation in claimant's right knee.

In his report, Dr. Taylor acknowledges that Ms. Meyer "did not sustain direct trauma to the [right] knee." (Claimant's Ex. 2, p. 12) Accordingly, using the footnote to Table 17-31, claimant had neither crepitation in the right knee prior to the December 2017 work injury, nor direct trauma, as required to assign permanent impairment of the right lower extremity. Dr. Taylor appears to recognize and acknowledge these shortcomings in his examination and the history and opines, "I do not recommend the full 5% that can be assigned, but rather I would recommend 2% right lower extremity impairment related to the patellofemoral-related pain." (Claimants' Ex. 2, p. 12) Yet, nothing in Table 17-31 or its footnote permits a physician to award something other than 5% of the lower extremity or to award impairment if the criteria of the Table or the footnote are not met. I find that Dr. Taylor was reading something into the AMA Guides that does not exist within the Guides.

Ultimately, I accept the critique offered by Dr. Chen as most accurate and consistent with the AMA Guides, Fifth Edition. I find the impairment rating offered by Dr. Taylor for claimant's right knee is not supported by the AMA Guides, Fifth Edition. Therefore, I find the opinion of Dr. Chen most convincing on the issue of the right knee.

I specifically find that Ms. Meyer did not prove she had a ratable permanent impairment of the right knee or leg prior to the December 13, 2017 work injury. Ms. Meyer required no ongoing medical treatment for the right knee from April 2010 through the date of the work injury in December 2017. I further find that she was working full

duty without medical restrictions for her right knee at the time of her December 13, 2017 work injury. I further specifically find that Ms. Meyer failed to prove she had permanent loss, permanent loss of use, or permanent disability as a result of her right knee condition prior to December 13, 2017.

CONCLUSIONS OF LAW

Ms. Meyer seeks an award of benefits from the Second Injury Fund of Iowa. 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. Iowa Code section 85.64.

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 Second Injury 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 1979).

In this case, Ms. Meyer alleges she sustained a prior qualifying injury to the right leg in 1995. Ms. Meyer relied upon the medical opinion of Dr. Taylor to support her contentions and to establish permanent functional impairment of the right leg prior to December 13, 2017. Based upon Dr. Taylor's opinion that Ms. Meyer sustained a two percent permanent functional impairment of the right leg prior to the December 13, 2017 work injury, as well as her own testimony about ongoing symptoms in the right knee prior to her work injury, Ms. Meyer asserts she has proven a qualifying first injury to the right leg.

The Second Injury Fund denies that claimant has proven she sustained permanent functional loss of the right leg prior to the December 13, 2017 work injury. Instead, the Second Injury Fund noted claimant had no permanent restrictions and no ongoing medical care for the right leg prior to December 13, 2017. The Second Injury Fund also produced the opinion of Dr. Chen questioning the methodology for Dr. Taylor's permanent impairment rating. Specifically, Dr. Chen noted that Dr. Taylor should only assign permanent impairment for the right knee using the footnote of Table 17-31 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, when there has been a direct trauma to the leg.

Claimant does not assert a direct trauma to her right leg caused her permanent impairment. Dr. Taylor does not identify any direct trauma to the right leg and, in fact, noted the opposite. Dr. Taylor did not provide any explanation why he varied from the direct language and requirements of the AMA Guides, Fifth Edition, when rendering his permanent impairment rating for the right leg. His impairment rating does not appear to conform to the requirements of the AMA Guides, Fifth Edition.

A statutory change made to Iowa Code section 85.34(2)(x) in 2017 demonstrated the Iowa legislature's preference and policy choice to utilize the AMA Guides as the governing standard for determining permanent functional impairment of a scheduled member injury such as a leg. While Iowa Code section 85.34(2)(x) is not directly applicable to a first qualifying injury in a Second Injury Fund claim, it does demonstrate the legislature's preference for the use of the AMA Guides to determine permanent functional disability.

Moreover, the Iowa Workers' Compensation Commissioner has adopted the AMA Guides, Fifth Edition, as the governing standard "for determining the extent of loss or percentage of impairment for permanent partial disabilities." 876 IAC 2.4. Once again, this administrative rule does not directly refer to the Iowa Second Injury Compensation Act, Iowa Code section 85.64. However, it is apparent that the preference for determining permanent impairment, or permanent disability, for scheduled member injuries requires the use of the AMA Guides, Fifth Edition.

Having weighed the competing medical expert's opinions, I found the critique offered by Dr. Chen to be well founded within the specific language of the AMA Guides, Fifth Edition. Accordingly, I found that Dr. Taylor's permanent impairment rating for the right leg was not in conformity or supported by the specific language of the AMA Guides, Fifth Edition. Claimant offered no other convincing evidence that proved by a preponderance of the evidence that she had a permanent disability, permanent loss, or permanent loss of use of the right leg before the December 13, 2017 work injury. Therefore, I conclude that claimant failed to carry her burden of proof to establish a qualifying first injury or a viable claim for Second Injury Fund benefits. I conclude that claimant's claim against the Second Injury Fund should be dismissed without an award of benefits. All other disputed issues are rendered moot as a result of this conclusion.

Finally, claimant requests that her costs be taxed against defendant. Costs are taxed at the discretion of the agency. Iowa Code section 86.40. However, costs statutes are construed strictly. Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992). In this instance, I conclude that claimant failed to establish a compensable Second Injury claim. Therefore, I similarly conclude that no costs should be assessed against the Second Injury Fund of Iowa.

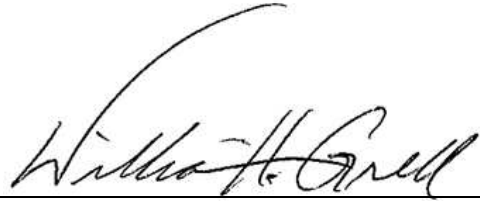
ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing from the Second Injury Fund of Iowa.

All parties shall bear their own costs.

Signed and filed this 24th day of June, 2021.

A handwritten signature in black ink, reading "William H. Grell", written over a horizontal line.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Zeke McCartney (via WCES)

Amanda Rae 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.