BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KELLY MORTENSEN,	:	
Claimant,	:	File No. 5025581
vs.	:	A R B I T R A T I O N
SECOND INJURY FUND OF IOWA,	:	D E C I S I O N
Defendant.	:	Head Note No.: 3202

STATEMENT OF THE CASE

Kelly Mortensen, claimant, filed a petition in arbitration seeking workers' compensation benefits from Gerdau Ameristeel and its insurer, ESIS, Inc. and the Second Injury Fund of Iowa, as a result of an injury he allegedly sustained on June 21, 2006 that allegedly arose out of and in the course of his employment. This case was heard and fully submitted in Des Moines, Iowa on June 17, 2009. The evidence in this case consists of the testimony of claimant and claimant's exhibits 1 through 5 and defendant's exhibits A and B.

Claimant's oral motion to dismiss Gerdau Ameristeel and ESIS, Inc., as parties in this proceeding was orally agreed to by the Second Injury Fund and orally agreed to by Gerdau Ameristeel and ESIS, Inc. Claimant's oral motion was orally granted at the evidentiary hearing and the Second Injury Fund of Iowa is the only remaining defendant in this matter.

ISSUE

Whether claimant is entitled to Second Injury Fund benefits and, if so, the amount of benefits.

FINDINGS OF FACT

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

Kelly Mortensen, claimant, was born in 1970, making him 39 years old at the time of the evidentiary hearing. (Claimant's Testimony) He is left-hand dominant. (Cl. Testimony) He is a high school graduate and attended one semester of community college in 1993. (Cl. Testimony) While wrestling in high school in 1988, he dislocated his right kneecap. (Cl. Testimony) Since the original dislocation the kneecap has

dislocated or the knee has given out twice. (Cl. Testimony) When it dislocated he missed work for one day, was put on light duty and returned to work without restrictions. (Cl. Testimony) He has not had surgery on the right knee. (Cl. Testimony)

Claimant's work history includes working as a sales clerk, busing tables, bagging soil and as a painter. (Cl. Testimony and Exhibit 4, page 12) Claimant began working at North Star on May 9, 1989. (Cl. Testimony and Ex. 4, p. 12) North Star was subsequently purchased by Gerdau Ameristeel (hereinafter Gerdau). (Cl. Testimony and Ex. 4, p. 12) Gerdau and North Star were in the business of producing steel. (Cl. Testimony) Gerdau and its employees are covered by a collective bargaining, union contract. (Cl. Testimony) Bumping rights to jobs and layoffs based on seniority are governed by the union contract. (Cl. Testimony) Claimant has 20 years of seniority, but other employees have 30-35 years of seniority. (Cl. Testimony) Claimant worked various jobs at Gerdau including jobs in the shipping department, rolling mill and productions. (Cl. Testimony and Ex. 4, p. 12) Much of the production work at Gerdau is mechanized and involves the use of cranes and other machines. (Cl. Testimony) Some of the time some of the jobs can be physically demanding. (Cl. Testimony)

On June 21, 2006, claimant sustained a work injury when a bar of hot steel buckled and hit him causing multiple injuries. (Cl. Testimony) At the time he was working as a millman in the rolling mill earning a base pay of $22.05 per hour. (Cl. Testimony) He was eventually referred to Tyson Cobb, M.D., fellow in hand and microvascular surgery, who performed surgery on the right arm. (Cl. Testimony) The injury and surgery left claimant with multiple scars on the right arm. (Cl. Testimony and Ex. 5, pp. 13-14) Claimant had physical therapy for his forearm, wrist and hand from July 10, 2006 through January 29, 2007. (Ex. B, pp. 12-30) Dr. Cobb provided claimant follow-up care seeing him multiple times. (Ex. A, pp. 1-11) Dr. Cobb returned claimant to light duty on January 23, 2007 with a 10 pound lifting restriction and on April 17, 2007 with a 15 pound weight restriction to avoid heat extremes.

Claimant's return to work while on light duty was an office job where he used a computer. (Cl. Testimony) Claimant was laid off from the light duty job. (Cl. Testimony)

On January 29, 2008, Dr. Cobb felt claimant was at maximum medical improvement; noted an impression of status post ulnar artery repair as well as flexor digitorum superficialis and flexor digitorum profundus to the middle, ring and little fingers; and thought claimant should have a functional capacity evaluation to more accurately assess permanent impairment. (Ex. A, p. 10)

The functional capacity evaluation was done on February 12, 2008. (Ex. 2, p. 5) The evaluator found the functional capacity evaluation tests were valid and that claimant was able to work medium level physical demand activities for eight hours a day. (Ex. 2, p. 5) The evaluator noted, among other things, claimant could stand constantly; could stair climb frequently; could squat frequently, demonstrated the ability to perform a full

squat and claimant reported some previous knee problems “from high school;” could walk constantly, no problems reported with the knees; and could climb a ladder frequently. (Ex. 2, p. 7)

On April 23, 2008, Dr Cobb opined that claimant’s permanent impairment was equivalent to 20 percent of the whole person and recommended permanent restrictions of:

> He should be aware of any extremes in cold or heat, and that he should be able to work 8 hour days at the medium level, which includes lift, push-pull, and carry from a low of 30 pounds to occasional 80 pounds.

(Ex. 1, p. 2)

Gerdau’s attorney wrote Dr. Cobb a letter dated March 27, 2009, effectively asking the doctor to clarify his impairment rating of April 23, 2008. (Ex. 1, p. 3) Dr. Cobb responded in a letter dated May 19, 2009 that claimant’s permanent impairment was 26 percent of the right upper extremity using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 1, p. 4) The parties agree claimants’ permanent impairment from the June 21, 2006 injury is to his right arm and is 26 percent of the right arm. (Discussion at evidentiary hearing)

Claimant’s attorney referred him to Joseph Creighton, D.O. (Ex. 3, p. 10) In a letter dated May 15, 2009, Dr. Creighton wrote:

> I had the opportunity to examine Mr[.] Mortensen on April 11, 2009. Based upon his history and examination, Mr. Mortensen sustained an injury to his right forearm at work June 21, 2006. In addition to this injury, he also has a prior injury to his right knee while in high school. Since that injury, he has experienced multiple recurrences of a right patellar dislocation.
>
> You have inquired as to my opinion regarding any functional impairment and restrictions he may have as a result of these pre-existing injuries. In my opinion he has sustained a 2% pre-existing permanent impairment to his right leg, as a result of the injury in high school. As a result of his right knee condition, he should avoid kneeling, squatting, crawling, crouching and lifting in certain positions. This condition is permanent in nature.
>
> These opinions are based upon a reasonable degree of medical certainty based upon my experience and training as a physician. My experience includes conducting over 1000 physical examinations on military personnel.

(Ex. 3, p. 10)

Claimant testified to the following at the evidentiary hearing (June 17, 2009). He returned to work at Gerdau after the layoff from the light-duty office job. His return to work was as a set up person. The set up person job pays less than a millman job. He has laid off again on May 10, 2009 and was still laid off. If he is recalled, he might go back as a laborer which currently pays a base pay of $18.00 per hour, the lowest paying position in the plant. His recall will be to work in the plant. But for the layoff, he would still be working at the plant. He has to be a lot more careful in using his right arm because of lack of strength and the inability to feel hot or cold temperatures. He feels pressure on the right wrist; cannot move his right hand side to side; his little finger is stiff and he cannot grip with the right hand; he lacks strength in the right arm; and the extension of his right arm is the same as the left arm. He described the following limitations of the right knee: he was not able to continue doing a martial art; he cannot jog; and his kneecap occasionally dislocates. He passed a pre-employment physical before beginning work at Gerdau's predecessor, but there was no examination of his right knee. The evaluator doing the functional capacity evaluation tested his right knee, but not much, and the evaluator did not have him do squats while twisting. He is currently looking for other work. (Cl. Testimony)

Based on the evidence in the record, the following is found. Following recovery from the June 21, 2006 injury, claimant eventually returned to work at Gerdau. The job he returned to in the plant was a setup person. The position was not a make work job and he did the job. He was assigned to that job based on his seniority or lack thereof. His current layoff was due to his lack of seniority and not his physical condition.

CONCLUSIONS OF LAW

The issue to be resolved is whether claimant is entitled to Second Injury Fund benefits and, if so, the amount of 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); Iowa Practice, Workers' Compensation, Lawyer and Higgs, section 17-1 (2006).

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 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

The first matter that will be resolved is whether claimant sustained a first qualifying loss, namely the right leg.

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. 6.14(6).

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).

It is not necessary that the first loss result in industrial disability to constitute a loss of use. Second Injury Fund of Iowa v. Bergeson, 526 N.W.2d 543, 548 (Iowa 1995).

Dr. Creighton opined that claimant has a two percent permanent impairment to his right leg and permanent restrictions as a result of the high school injury. Dr. Creighton's opinion is uncontradicted by expert opinion in the record and is supported by claimant's testimony. Nothing in the record suggests that Dr. Creighton's opinion is flawed or cannot be given weight. Claimant's loss of the right let may not be significant, but he has nonetheless proved he had a permanent loss of use of the right leg. Claimant has proved he had a prior qualifying loss of the right leg of two percent.

The parties agree that claimant sustained a 26 percent compensable loss of use of the right arm from the June 21, 2006 injury.

The next matter that must be resolved is the claimant's industrial disability from the cumulative effects of the loss of use of his right leg/knee and of the right arm.

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. 6.14(6).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W.2d 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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.

Claimant was 39 years old at the time of the evidentiary hearing. He is a high school graduate. He has worked at Gerdau or its predecessor since 1989 in production work, processing steel. He was able to do that job without apparent difficulty involving the right knee. Following his June 21, 2006 injury to his right arm, he eventually returned to work in production at Gerdau. His pay when he returned to work was based on the positions he was assigned, which in turn was determined by how much seniority he had. He was able to do the production work. His current layoff is not due to his physical condition. Dr. Creighton has rated his permanent impairment as two percent of the right lower extremity and suggested restrictions of avoiding kneeling, squatting, crawling, crouching and lifting in certain positions. Dr. Cobb rated claimant's permanent impairment as 26 percent of the right upper extremity, imposed restrictions of being aware of extremes in cold or heat and following a functional capacity evaluation he thought claimant should be able to work eight hours a day at the medium level which includes lift, push-pull and carry from a low of 30 pounds to occasional 80 pounds. As discussed above, claimant returned to work in production at Gerdau with these restrictions. When all relevant factors are considered, claimant had an industrial disability of 25 percent as a result of the cumulative effects of the loss of use of the right leg/knee and right arm.

An industrial disability of 25 percent of the combined effects of these losses entities claimant to 55.6 weeks of benefits from the Second Injury Fund of Iowa. [(25 percent x 500 weeks) – (2 percent x 220 weeks + 26 percent x 250 weeks)].

ORDER

THEREFORE, it is ordered:

That the Second Injury Fund of Iowa is to pay unto claimant fifty-five point six (55.6) weeks of permanent partial disability benefits at the rate of six hundred thirty-six and 34/100 dollars ($636.34) per week from November 7, 2007.

That the Second Injury Fund of Iowa shall pay accrued weekly benefits in a lump sum.

That the Second Injury Fund of Iowa benefits shall accrue interest from the date of this decision.

That each party shall pay its own costs.

Signed and filed this ____2nd_____ day of July, 2009.

_____
CLAIR R. CRAMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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