

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LORETHA WALLACE,

FILED

Claimant,

APR 17 2017

File No. 5050119

vs.

WORKERS COMPENSATION

ARBITRATION

SECOND INJURY FUND OF IOWA,

DECISION

Defendant.

Head Note Nos.: 3202, 3203

STATEMENT OF THE CASE

Claimant, Loretha Wallace, filed a petition in arbitration seeking workers' compensation benefits from the Second Injury Fund of Iowa (Fund), as defendant. This case was heard in Des Moines, Iowa on February 7, 2017, with a final submission date of March 1, 2017.

The record in this case consists of Claimant's Exhibits 1-9, Defendant's Exhibits A-G, and the testimony of claimant.

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

1. Does claimant qualify for Fund benefits?
2. The extent of claimant's entitlement to Fund benefits.
3. Costs.

FINDINGS OF FACT

Claimant was 67 years old at the time of hearing. Claimant has a B.A. in social work from the University of Nebraska at Omaha. She also has a master's in public administration. Claimant worked as a family support worker for a child and family development program from November 2002 through December 2003. Claimant worked with Head Start from January of 2004 through July 2005. She worked as a partnership facilitator at Omaha's Head Start program from August 2005 until she retired in May of 2015. Claimant also worked part-time at Dillard's from August 2000 to April 2014. (Exhibit D, pages 36-37)

Claimant testified that on July 12, 2012, she went to lift a pallet at her job at Dillard's when the pallet fell on her right foot and ankle.

On February 18, 2013, claimant was evaluated by Grzegorz Skiba, M.D., for right foot pain radiating into the right lower extremity. Claimant is assessed as having right foot and leg pain from a job injury. A lumbar sympathetic block was recommended. (Ex. A, pp. 1-4)

On March 20, 2013, claimant underwent an L3 sympathetic block. (Ex. A, pp. 5-6)

On April 3, 2013, claimant was evaluated by Robert Greenhagen, D.P.M. for a contusion to the right foot. Claimant had right foot pain radiating up into the right leg. Claimant was assessed as having chronic right foot pain and superficial peroneal neuritis in the right lower extremity. (Ex. B, p. 7)

On May 23, 2013, claimant was at work at Dillard's. Claimant was leaning on a chair that had wheels. The chair moved and claimant fell to the floor, hitting her right knee and wrist.

Claimant returned to Dr. Greenhagen on August 19, 2013 for evaluation. Claimant was found to have a 22 percent permanent impairment to the right lower extremity, converting to a 9 percent permanent impairment to the body as a whole. Claimant's gait and need for orthopedic assistance devices was included in the rating. (Ex. B, pp. 8-9)

In a September 6, 2013 report, Dr. Greenhagen assessed claimant as having a right foot contusion causing a peripheral nerve injury. He opined claimant would need continued management for chronic pain for the rest of her life. (Ex. 1)

On January 6, 2014, claimant was evaluated by Mark Dietrich, M.D. Claimant had right knee pain from her May 23, 2013 fall at Dillard's. Claimant walked with a limp since the fall. Claimant had undergone corticosteroid and Synvisc injections. These injections provided only mild and temporary relief. Claimant was assessed as having advanced medial compartment degenerative arthritis in the right knee. (Ex. 2, p. 1)

Dr. Dietrich opined that claimant's fall at work aggravated an underlying degenerative arthritis. He put restrictions on claimant and found her injury resulted in a permanent impairment to the right lower extremity. (Ex. 2, pp. 2-3)

On February 26, 2014, claimant underwent a right total knee replacement. (Ex. 4, p. 1)

In a June 30, 2015 letter, Curtis Hartman, M.D., found that claimant had reached maximum medical improvement (MMI). (Ex. 2, pp. 2-3)

On February 26, 2014, claimant underwent a right total knee replacement. (Ex. 4, p. 1)

In a June 30, 2015 letter, Curtis Hartman, M.D., found claimant had reached MMI regarding the right knee injury. He found that, based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, claimant had a 50 percent permanent impairment to the right lower extremity in regards to her May 23, 2013 work injury. This impairment converted to a 20 percent permanent impairment to the body as a whole. He limited claimant to carrying no more than 20 pounds. (Ex. 5, Ex. 6, Ex. 7)

In an October 26, 2015 report, Dean Wampler, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had continued right knee pain. Claimant used a cane if walking any distances. Dr. Wampler opined claimant had complex regional pain syndrome (CRPS) in the buttock and right leg from her right foot and ankle injury. (Ex. 7, pp. 1-5) Dr. Wampler opined that claimant had a 5 percent permanent impairment to the body as a whole based upon a finding claimant fell into a lumbar DRE II under the Guides. (Ex. 7, pp. 6-7)

In an April 26, 2016 compromise settlement, under Iowa Code section 85.35(3), claimant, defendant Dillard's, and the insurance carrier, settled claimant's July 17, 2012 injury for \$16,302.50. The settlement indicates the dispute between the parties involved the nature and extent of claimant's right foot and ankle injury. Claimant contended she sustained a body as a whole regarding the July 2012 injury. Defendants denied claimant sustained a body as a whole injury. (Ex. E)

On May 3, 2016, an agreement for settlement was approved between claimant, defendant Dillard's, and the insurance carrier regarding claimant's May 23, 2013 right knee injury. Settlement was based upon a 50 percent rating to the right lower extremity. (Ex. F)

In a November 2, 2016 report, Theresa Wolford, MS, CRC, gave her opinions of claimant's vocational opportunities. Ms. Wolford opined that, given claimant's restrictions, age, and impairment, claimant would not be capable of maintaining full time competitive employment. (Ex. 8)

In a December 27, 2016 report, Jeff Johnson, MS, gave his opinion of claimant's vocational opportunities. He opined claimant had the physical ability to perform her previous full time job as a caseworker with Head Start. He opined that claimant's restrictions placed her in the light work classification. He found that claimant had a loss of access to employment of 45 to 54 percent. (Ex. C)

Claimant said she could stand for approximately 10 minutes. She said she could walk approximately 70 feet. She said if she walks further she usually uses a cane. Claimant says she uses a cane almost daily. Claimant is limited in lifting. Claimant testified she has difficulty with sleeping due to pain. Claimant sat and stood repeatedly throughout the hearing to deal with issues of discomfort. Claimant testified she takes prescription pain medication.

Claimant testified she received a lumbar sympathetic block in regards to her first injury. She testified that Dr. Wampler has assessed her as having CRPS regarding her first injury. She testified that no doctor has rated her first injury as an injury to the foot.

She said that all ratings for her first injury have been either to her right leg or the body as a whole.

Claimant testified she believes she has a back injury as a result of the 2013 work accident.

CONCLUSIONS OF LAW

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 Rule of Appellate Procedure 6.14(6).

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).

In this case claimant, claimant sustained a July 2012 injury to her right foot and ankle. That injury was rated by Dr. Greenhagen as an injury to the right lower extremity. (Ex. B, pp. 8-9) Dr. Wampler also performed an IME on claimant. He found that the July 2012 injury resulted in CRPS. Case law indicates that CRPS is to be evaluated industrially. Collins v. Department of Human Services, 529 N.W.2d 627 (Iowa App. 1995). No physician has rated claimant's July 12, 2012 injury as a permanent impairment to the foot.

Claimant had a second injury on May 23, 2013 to the right knee. Claimant received a rating for this injury to the right lower extremity. (Ex. 5, Ex. 6, Ex. 7)

Fund liability is triggered when an employee has lost, or lost the use of a hand, arm, foot, leg or eye, and becomes permanently disabled by a compensable injury that results in the loss, or loss of use of "another such member or organ." Iowa Code section 85.64.

The Iowa Supreme Court has ruled that to invoke Second Injury Fund liability, both the first and second injuries must be scheduled member injuries. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Scheduled member injuries are those parts of the body specifically listed in Iowa Code section 85.34(2)(a-t). Unscheduled injuries are those not specifically listed and are covered by Iowa Code section 85.34(2)(u). See generally, Martin v. Skelly Oil Co., 252 Iowa 128, 133 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). In Nelson the Court stated that although one of the qualifying members under Iowa Code section 85.64 may be involved, such as an arm, if the injury involves the shoulder it is unscheduled and not a qualifying injury under Iowa Code section 85.64 to invoke Fund Liability. Nelson, 544 N.W.2d at 270.

The Iowa Supreme Court has more recently modified the holding in Nelson. A loss of use to one hand, arm, foot, leg, or eye remains a qualifying-first loss for Second Injury Fund benefits, even if it occurs simultaneously with injuries to other parts of the body, including the body as a whole. Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 396, (Iowa 2010). The Court also has held that an injury to a hand, arm, foot, leg, or eye can still be a qualifying-second injury even if that member was previously injured, so long as there was a prior injury to a different member on which the Commissioner could rely to find a qualifying first injury. Second Injury Fund of Iowa v. Kratzer, 778 N.W.2d 43 (Iowa 2010).

In Kratzer, claimant sustained a bilateral knee injury in 1994 for a first injury, and a left knee injury in 2004. The Court held claimant's 2004 injury to the left lower extremity was a qualifying injury to "another member", as claimant had a 1994 injury to the right lower extremity. The Court also noted claimant's 1994 injury to the left lower extremity was not a qualifying first injury as the 2004 injury was also to the left lower extremity. ("We conclude this phrase, when construed as it must be in favor of the injured employee, was intended to require only that the subsequent disabling injury to be an enumerated member other than the member relied upon by the claimant to establish the first qualifying injury.") Kratzer at 46. See also Gregory 777 N.W. 2d at 40 ("The focus of our analysis must therefore be on whether Gregory sustained a permanent partial loss of at least two enumerated members in successive injuries.")

The proximal point of a joint is used to classify the nature of disability. Holstein Elec. v. Breyfogle, 756 N.W. 2d 812, 816(Iowa 2008) (finding an injury to the wrist is to be compensated as an injury to the upper extremity). Agency case law has consistently applied Breyfogle to find that an injury to an ankle is to be compensated as an injury to the lower extremity, and not to the foot. Mettler v Waldinger Corp., File No. 5017312 (Arb. Dec September 23, 2008); George v. Johnsrud Transport, File No. 5042692 (Arb. Dec. October 14, 2014).

Claimant's first injury was an injury to her right foot and ankle. Injuries to the ankle are to be evaluated as injuries to the lower extremity. Claimant has received no permanent impairment rating to her foot. The only permanent impairment rating claimant received regarding the July 2012 injury was ratings to the right lower extremity and to the body as a whole.

Claimant's second injury was an injury to her right knee. The only rating claimant received for the May 2013 injury was to the right lower extremity.

Claimant's first and second injuries are both to the right lower extremity. Given these facts, claimant has failed to carry her burden of proof she sustained a second loss to another member. As a result, claimant has failed to carry her burden of proof she qualifies for Fund benefits.

As claimant has failed to carry her burden of proof she sustained a qualifying first and second injury for the purposes of Fund benefits, all other issues are moot.

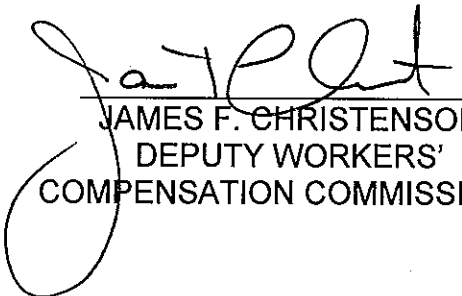
ORDER

THEREFORE, IT IS ORDERED:

That claimant shall take nothing from these proceedings.

That both parties shall pay their own costs.

Signed and filed this 17th day of April, 2017.


JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFC/srs

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.