

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BOUAPHAN SEVERIN,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

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File No. 1521101.01

ARBITRATION DECISION

Head Notes: 1402.40, 3202

STATEMENT OF THE CASE

Claimant, Bouaphan Severin, filed a petition in arbitration seeking benefits from the Second Injury Fund of Iowa ("Fund") as defendant. This matter was heard on May 3, 2021, with a final submission date of June 1, 2021.

The record in this case consists of Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 5, Defendant Fund's Exhibits AA through FF, 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. Whether claimant has a qualifying first injury for the purposes of Fund benefits.
2. The extent of claimant's entitlement to Fund benefits.
3. Credit.
4. Commencement date of benefits.
5. Costs.

FINDINGS OF FACT

Claimant was 55 years old at the time of hearing. Claimant was born in Laos. Claimant came to the United States in 1981. Claimant graduated from high school. She attended some college but did not graduate.

Claimant has worked as a cashier, a restaurant supervisor, and a restaurant hostess. (Claimant Exhibit 4, p. 36)

Beginning in January 1998, claimant began working full time as a nutritional worker for Linn-Mar Schools. (Defendant Fund's Exhibit DD, p. 15) Claimant's job duties included, but were not limited to, preparing meals for several hundred school children, serving meals and cleaning up after meals. (Testimony pp. 12-16, 22)

Claimant testified she injured her right ankle at work in approximately May of 2007. (TR p. 31)

On May 17, 2007, claimant was evaluated by Nate Brady, M.D., for right ankle pain. An x-ray showed a non-acute osteochondral defect. Dr. Brady assessed claimant as having a right ankle sprain. She was put in an Aircast and given crutches. Claimant was given restrictions of sitting only at work. (Joint Exhibit 1, p. 1)

Claimant returned to Dr. Brady on August 30, 2007. Claimant had been doing well on summer break, but noticed pain on returning to school. Claimant was referred to a podiatrist and physical therapy. Claimant had no work restrictions. (JE 1, p. 2)

Claimant went to physical therapy from September 27, 2007, through October 25, 2007. Physical therapy records on October 25, 2007, indicate claimant was discharged from physical therapy and had met all her physical therapy goals. (JE 7, p. 45)

On September 30, 2010, claimant was evaluated by William Manely, PA-C. Claimant had bilateral forearm discomfort. Claimant noticed pain 3-4 weeks prior when she was lifting a steamer with both hands and developed bilateral forearm pain. Claimant was found to have bilateral forearm strain with a date of injury of September 2, 2010. Claimant was restricted to no repetitive use of the bilateral upper extremities and no lifting or carrying more than 5 pounds. (JE 2, p. 19)

Claimant returned to Physician's Assistant Manely on October 7, 2010, with continued complaints of bilateral forearm pain. Claimant was instructed to work within her permanent restrictions and continued on physical therapy. (JE 2, p. 20)

Claimant saw Physician's Assistant Manely on October 21, 2010, with continued complaints of bilateral forearm pain. Claimant was referred to an orthopedic hand specialist. (JE 2, p. 21)

On November 9, 2010, claimant was seen by James Johns, M.D. Claimant was assessed as having lateral epicondylitis of the elbows. Claimant chose conservative treatment. Claimant was given restrictions and wrist and forearm straps. (JE 4, p. 27)

Claimant returned to Dr. Johns on March 1, 2011. Claimant's symptoms had improved. Claimant had residual lateral epicondylitis. She was given a permanent restriction of no lifting over 20 pounds. Claimant was found to be at maximum medical improvement (MMI) and had no permanent impairment. (JE 4, pp. 28-29)

Claimant returned to Dr. Brady on Jun 24, 2013. She was given an injection in the left elbow. (JE 1, pp. 3-4)

Claimant saw Dr. Brady on August 9, 2013, for right ankle pain. Claimant was told to get new inserts for her shoes. Claimant was assessed as having chronic right ankle pain. An MRI of the right ankle was recommended. (JE 1, pp. 6-7)

On December 12, 2013, claimant was evaluated by Phinit Phisitkul, M.D. at the University of Iowa Hospitals and Clinics (UIHC) for right ankle pain. Dr. Phisitkul noted claimant had:

Osteochondral injury of the medial talar dome, thinning and irregularity of the medial tibial plafond articular cartilage, 10 x 2 x 4 mm ossific intra-articular loose body of the ankle joint with the donor site being at the osteochondral injury of the medial talar dome with articular cartilage irregularity of the medial tibial plafond, as well as os naviculare.

(JE 6, p. 38)

Dr. Phisitkul released claimant to work with no restrictions and discussed five different treatment options for her ankle. Records indicate claimant was interested in arthroscopic surgery. (JE 6, pp. 38-42)

Claimant testified at hearing she did not pursue surgery with Dr. Phisitkul. (TR p. 32)

Claimant returned to Dr. Brady on March 25, 2014, for her bilateral elbows. Claimant indicated she did not want to undergo a surgery for her ankle. Claimant was assessed as having persistent bilateral medial epicondylitis. She was referred for a platelet-rich plasma (PRP) injection. (JE 1, pp. 8-9)

On October 3, 2014, claimant underwent a functional capacity evaluation (FCE). Claimant was found to have given maximal effort. Claimant was found to be able to work in a sedentary to light category of work. (JE 3)

On December 1, 2014, claimant was evaluated by Joseph Chen, M.D. at the UIHC for bilateral upper extremity pain. Claimant indicated she had swelling of the elbows when lifting over 10-15 pounds. Claimant was assessed as having medial epicondylitis on the left and right upper extremities. Dr. Chen found that claimant had a 1 percent permanent impairment to both the left and right upper extremity. He found claimant at MMI. He limited claimant to lifting up to 15 pounds. (Ex. AA)

In a December 2, 2014 letter, EMC, insurer for claimant's employer, indicated claimant would be receiving permanent partial disability benefits based upon the rating by Dr. Chen. (Ex. BB)

In an August 12, 2015 report, Marc Hines, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had good

resolution of her symptoms, but continued to have limitations with prolonged standing and walking. (Ex. 2, pp. 18-20)

Dr. Hines believed diagnostic testing showed an alleged “free fragment” in claimant’s ankle. (Ex. 2, p. 20) Dr. Hines went on to note:

There is no table related impairment that can discuss this free fragment issue. The closest [sic] difficulty would be the impairments related in table 17-31 for cartilage interval impairments. The lowest of these would be 3 mm cartilage interval with a 2% whole person impairment. This difficulty would to my way of estimating it be approximately half of that impairment or an additional 1% whole person impairment, which would be added to the whole person impairment previously obtained.

(Ex. 2, p. 20)

In a June 8, 2017 letter, EMC indicated it was paying an additional 7.5 weeks of permanent impairment for claimant’s upper extremities. EMC indicated that without radiographic evidence of a cartilage defect, it was unclear how Dr. Hines arrived at his opinion that claimant had a 1 percent whole person impairment for the ankle injury. (Ex. BB, pp. 8-9)

Dr. Brady evaluated claimant on December 4, 2018, for ongoing bilateral elbow complaints. Claimant indicated her elbows were better during the summer when she was not working. Dr. Brady again recommended PRP injections. (JE 1, pp. 10-11)

An ultrasound was performed on February 6, 2019, of claimant’s upper extremities. It found no evidence of a significant tendinosis for support of PRP injections. (JE 6, p. 44)

On November 21, 2019, claimant returned to Dr. Brady. Claimant indicated her bilateral elbow motion had improved and that physical therapy was helpful. (JE 1, p. 14)

Claimant saw Dr. Brady on February 21, 2020, in follow-up. Claimant’s symptoms for epicondylitis had improved. Dr. Brady believed claimant would require periodic physical therapy in the future. Claimant was released to return to work with no restrictions. (JE 1, p. 15)

On February 11, 2020, in response to a letter written by claimant’s counsel, Dr. Brady indicated claimant told him that co-workers had helped her at work. He opined that if claimant lost her job at Linn-Mar, she would require restrictions. (Ex. 1, p. 1)

In a February 21, 2021 report, Sheila Capizzi, MA, CRC, gave her opinions of claimant’s vocational opportunities. Ms. Capizzi opined that claimant would experience significant impairment of earning capacity if she left her job at Linn-Mar. (Ex. 3)

Claimant testified she did not plan on retiring. (TR pp. 14-15) She said her co-workers routinely help her with her job duties when she has pain or swelling of her upper extremities. (TR pp. 23-26) Claimant said she would not last in her job if co-workers did not help her. (TR p. 28)

Claimant said she has not had much treatment for her right ankle in the past few years. (TR p. 32) She said she has difficulty with her ankle after standing for a full day of work. (TR p. 31)

Claimant testified she does not have any permanent restrictions for her right ankle. (TR p. 45)

CONCLUSION OF LAW

The first issue to be determined is if claimant has a qualifying first injury for the purposes of Fund benefits.

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. 6.904(3).

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 1979).

Claimant contends she has a qualifying first injury for Fund benefits regarding her right ankle.

Claimant testified she has difficulty standing for extended periods of time on her right ankle. (TR p. 31) She testified that she has not had treatment for her right ankle for several years. Claimant says she has no permanent restrictions regarding her right ankle. (TR pp. 32, 45)

Claimant treated on two occasions with Dr. Phisitkul for ankle pain. Claimant last treated for her right ankle in December of 2013. At that time, several treatment options were discussed, and claimant chose surgery. Claimant was returned to work at that time without restrictions by Dr. Phisitkul. (JE 6, p. 39) Claimant did return to work and

did not pursue surgery. Claimant's last treatment for her right ankle was in December of 2013. Claimant has worked without restrictions on her right ankle since August 30, 2007.

Only one expert has opined that claimant has a permanent impairment. Claimant was evaluated on one occasion for an IME by Dr. Hines. Dr. Hines opined that claimant had a 1 percent permanent impairment to the body as a whole based on table 17-31 of the AMA Guides to the Evaluation of Permanent Impairment. This table deals with permanent impairment based on cartilage intervals. As noted in the Findings of Fact, Dr. Hines opined:

There is no table related impairment that can discuss this free fragment issue. The closet [sic] difficulty would be the impairments related in table 17-31 for cartilage interval impairments. The lowest of these would be 3 mm cartilage interval with a 2% whole person impairment. This difficulty would to my way of estimating it be approximately half of that impairment or an additional 1% whole person impairment, which would be added to the whole person impairment previously obtained.

(Ex. 2, p. 20)

Dr. Hines' opinion regarding permanent impairment is questionable. Table 17-31 of the Guides is for arthritis impairments based upon roentgenographically determined cartilage intervals. Dr. Hines did not have x-rays or any imaging studies. In brief, Dr. Hines made up a rating that is not supported by the Guides.

Prior agency decisions also question Dr. Hines' methodologies for finding causation and rating claimants. See Perez v. West Liberty Foods, File No. 5033695 (Arb. September 15, 2011); Brown v. Menard, Inc., File No. 5040961 (Arb. November 5, 2013); Olson v. Brooks Park Resorts, File No. 5043565 (Appeal September 9, 2015); Olhausen v. 1st Step Chiropractic, File No. 5045054 (Arb. October 31, 2016); Kovach v. Titan Machinery, Inc., File No. 5053492 (Arb. September 13, 2016); Grouette v. Gilbane Building Co., File No. 5044473 (Appeal September 18, 2017); Franklin v. Roper Industries, File No. 5062030 (Arb. Dec. February 22, 2018); Jones v. Raining Rose, Inc., File No. 5048297 (App. Dec. February 13, 2018)

In this case, Dr. Hines made up a rating for claimant's ankle that is not found or supported in the Guides. Dr. Hines' methods of rating have been found questionable in prior agency decisions. Given this record, Dr. Hines' opinion regarding permanent impairment is found not convincing.

Claimant last treated for her right ankle condition in 2013. Claimant has worked without restrictions on her right ankle since 2007. Dr. Hines' opinion regarding permanent impairment is found not convincing. No other expert has opined that claimant has a permanent impairment to the right ankle. Given this record, it is found claimant has failed to carry her burden of proof she has a qualifying first injury for the purposes of Fund benefits.

The record indicates that claimant is a hard-working person. The record indicates that she has some difficulties with standing for long periods on her right ankle. However, because the only expert opinion regarding permanent impairment in the record is found not credible, I am unable to find in claimant's favor on this issue.

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

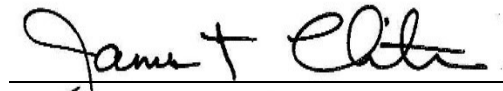
ORDER

THEREFORE IT IS ORDERED:

That claimant shall take nothing in the way of Fund benefits from this proceeding.

That both parties shall pay their own costs.

Signed and filed this 4th day of October, 2021.


JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Meredith Cooney (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.