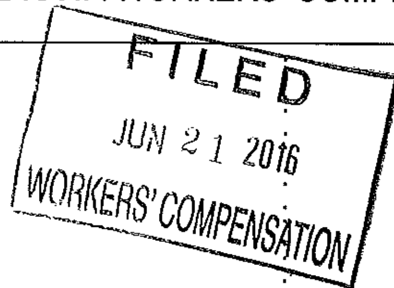
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



DANIEL BOVY, Claimant,	:	File No. 5042474
vs.	:	ARBITRATION DECISION
SECOND INJURY FUND OF IOWA, Defendant.	:	Head Note Nos.: 3200, 3202

STATEMENT OF THE CASE

Claimant Daniel Bovy filed a petition for arbitration seeking workers' compensation benefits from Power Engineering and Manufacturing, Ltd., employer, and SFM Insurance Company, insurance carrier, and Second Injury Fund of Iowa. The matter proceeded to hearing on February 26, 2016. The record was held open pending settlement papers with the defendant employer. The settlement was approved on April 7, 2016. The litigated case was considered fully submitted on April 20, 2016, upon the simultaneous filing of briefs.

The evidence in this case consists of the testimony of claimant; and claimant's exhibits 1-28; and defendant Fund's exhibits AA-DD.

ISSUE

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

STIPULATIONS

The stipulations of the hearing report are adopted herein. The parties stipulate claimant sustained an injury on September 1, 2011, arising out of and in the course of his employment. Claimant's gross weekly earnings at the time of the injury was $765.31. He was single but entitled to two exemptions. His weekly benefit rate is $489.92.

Claimant and defendant employer settled this matter on April 7, 2016, for 19 percent permanent partial disability to the upper right extremity.

FINDINGS OF FACT

Claimant was a 54-year-old at the time of the hearing. At the time of his injury, he was unmarried with one dependent. He graduated from high school and went on to attend post-secondary education at the Hawkeye Institute of Technology in 1985 where he received a certificate in automatic screw machine, blueprint reading and precision measurement.

In 1986 he entered the Navy and was discharged in 1991. For approximately 10 years, he worked at Allied Swiss Screw Products as a lead machinist. He then worked as a web press operator at Express Bill, a division of WebMD. In 2004 he began working for the defendant employer as a machinist.

He has limited computer skills but maintains a valid driver's license without restrictions. He earned above average grades in high school and received training in aviation structural mechanics in the navy.

While claimant was in high school he sustained an injury to his left knee. He eventually went on to have surgery in 1979 to repair a torn meniscus. After surgery, he had some activity restrictions and participated in physical therapy. It did not prevent him from entering the Navy nor was there any testimony that it prevented him from obtaining employment.

He was given no physical restrictions as a result of his knee surgery. Medical records reveal that claimant had treatment for his knee with Roswell M. Johnston, D.O., in 2001. There was no history of injury or trauma. On examination Dr. Johnston noted extremely tight hamstrings, and localized tenderness into the buttocks and the back of the thigh and posterolateral calf of the left leg. (Exhibit 0, page 1) Dr. Johnston suspected that it was mild sciatica affecting the left leg. There was no mention of a knee injury. Dr. Johnston administered an epidural injection but relief appeared to last only three days or so. MRIs of the lumbar spine were to be taken but the next visit recorded in evidence was in 2008. (Ex. 0, p. 2) At that time, claimant reported moderately severe pain occurring with weight-bearing along with popping and catching in the knee. (Ex. 0, p. 2) Dr. Johnston found no structural or ligamentous instability and no findings of any injury on x-ray. A cortisone injection was administered to provide relief.

In April 2015, claimant mentioned knee pain to his family doctor, Jeffrey Sutton, M.D. (Ex. 4, p. 148) Claimant noted he had popping in the knee in addition to a chronic ongoing low back pain that radiated down the left leg. (Ex. 4, p. 148) X-rays were taken and orthopedic consult was recommended. Dr. Sutton discharged claimant with a diagnosis of chronic low back pain and left knee pain. (Ex. 4, p. 151)

The work injury took place on or about September 1, 2011. Claimant was in the process of tightening a bolt with a wrench when the tool slipped, causing claimant to strike his right hand on the edge of the machine.

He was initially evaluated by Kenneth McMains, M.D. X-rays showed no sign of any fracture or dislocation. (Ex. 1, p. 6) He was diagnosed with a wrist strain. He continued to have pain with increased swelling and the prospect of a ligamentous tear was raised. (Ex. 1, p. 23) The MRI results revealed an ulnar collateral wrist sprain with mild carpal tunnel narrowing and a mild furring of the TFCC at its ulnar attachment. (Ex. 2, p. 37) Timothy S. Loth, M.D., a board-certified orthopedic specialist recommended conservative care and injected the claimant's wrist on November 28, 2011. (Ex. 2, p. 38) After conservative care did not provide the results claimant was anticipating, Dr. Loth recommended surgery. (Ex. 2, p. 41) Surgery was performed on February 8, 2012. While performing the surgery, Dr. Loth encountered synovitis throughout the wrist as well as partial tear of the triangular fibrocartilage complex and the ulnar ligament. (Ex. 2, p 42) He removed the pisiform bone. (Ex. 2, p. 42)

After a period of recovery, claimant undertook a period of occupational therapy to increase his range of motion and strength. (Ex 1, p. 48) On July 12, 2012, claimant was returned to full duty work. (Ex. 1, p. 2) On or about August 20, 2012, claimant was engaged in the task of cleaning a grinder. The work involved a lot of hand and wrist movements. By the end of the day, claimant was suffering significant pain in his wrist and could hardly bend it.

He returned to Dr. Loth who administered an injection to the ulnar wrist, took claimant off of work, and imposed a 50-pound weight restriction. (Ex. 1, p. 54) When claimant saw Dr. Loth again on September 11, 2012, Dr. Loth recommended that claimant either live with the discomfort and have permanent restrictions, or proceed with an ulnar shortening osteotomy. The claimant, per the records, became agitated and left after expressing profanities about the options he was provided by Dr. Loth.

Dr. Loth recommended claimant seek a second opinion. (Ex. 1, p. 55) On November 16, 2012, Peter Pardubsky, M.D., took over care for claimant's right wrist. (Ex. 1, p. 57) Dr. Pardubsky also recommended an ulnar shortening osteotomy for relief the ulnocarpal abutment. (Ex. 2, p. 59) Claimant underwent that surgery on April 9, 2013, wherein part of the ulnar bone was removed and plates and screws were placed. (Ex. 2, pp. 62-63).

Claimant continued to have pain and discomfort. He repeatedly expressed concern that there was a new or unrepaired tear. (Ex. 2, p. 75) Dr. Pardubsky did not recommend another surgery in the fall of 2013, but eventually acquiesced on October 30, 2013, he performed an arthroscopic debridement of the wrist. (Ex. 2, p. 86) Claimant was placed in a short arm cast and assigned no use of the right hand. (Ex. 2, pp. 54, 90)

The plates and screws were subsequently removed on April 29, 2014. (Ex. 2, p. 114-15) He attended physical therapy and saw some improvement. On June 23, 2014, Dr. Pardubsky declared claimant ready to return to work without restrictions. (Ex. 2, p. 121)

On August 25, 2014, claimant returned Dr. Pardubsky with complaints of ongoing pain. "He describes a warm feeling in the ulnar aspect of the wrist, numbness, and a feeling of tightness like a knot in the ulnar aspect of his wrist," with a pain rating of 3-6/10. (Ex. 2, p. 124) Dr. Pardubsky had no surgical recommendations and could not explain his current level of subjective pain. (Ex. 2, p. 125)

New work restrictions were imposed pending an FCE, but no immediate FCE was conducted.

Claimant then began to see Apurva S. Shah, M.D., at the University of Iowa Hospitals and Clinic on September 12, 2014. (Ex. 9, p. 1) Dr. Shah recommended an MR athrogram which showed a complete lunotriquetral ligament tear and volar intercalated segment instability. (Ex. 9, p. 191) Dr. Shah recommended that claimant undergo a partial wrist fusion but noted that there was not any perfect solution that would end in a pain-free result. A total wrist fusion would significantly impair mobility but would likely relieve the pain. (Ex. 9, p. 191)

Dr. Shah placed claimant on work restrictions of no lifting, pushing, pulling more than three pounds with the right upper extremity. (Ex. 9, p. 188)

Claimant was terminated from his job on October 13, 2014. He was working as a supervisor at that point.

Claimant decided to do the partial fusion and the surgery took place on March 3, 2015. (Ex. 9, p. 201) Claimant was placed on no use of the right hand until April 8, 2015, when the no use was lifted and replaced by a 1-2 pound restriction. On July 31, 2015, claimant's restrictions were lifted to 10 pounds. (Ex. 9, p. 222) That restriction was imposed by Ericka A. Lawler who took over the care from Dr. Shah on July 31, 2015. (Ex. 9, p. 221)

Claimant continued to have pain and functional problems. A CT scan was performed to ensure the stability of the fusion. Dr. Lawler stated:

> I had a long discussion with patient today regarding expected outcomes of this condition giving multiple prior procedures. We discussed specifically the altered mechanics of his wrist as a sequela of his prior procedures and that his wrist may never return to this same as his contralateral side. As the LT fusion has healed, I would not recommend any further surgery. There is also nothing surgical that I could offer him to relieve his pain. With regard to work restrictions we will plan for an FCE. I will calculate impairment along with restrictions upon request.

(Ex. 9, p. 233)

A functional capacity evaluation was conducted on January 28, 2016. (Ex. 10) Claimant gave a consistent effort and the results were deemed to be valid. (Ex. 10, p. 1) He exhibited decreased strength and function on the right along with pain upon use. (Ex. 10, pp. 8-9) He was also noted to have left knee pain on a ladder climb. (Ex. 10, p. 7)

At the request of the defendants, Dr. Lawler issued an impairment rating of 8 percent along with the following restrictions:

> Mr. Bovy underwent a Functional Capacity Evaluation with Darrin Ausman at Accelerated Rehabilitation on January 28, 2016 which was deemed to be a valid assessment of his functional abilities. Per the FCE he should have permanent restrictions including 2-handed floor to waist lifting of up to 45 pounds occasionally and 30 pounds frequently, 2-handed waist to shoulder lifting of up to 30 pounds occasionally and 20 pounds frequently, 2-handed overhead lifting of up to 20 pounds occasionally and 10 pounds frequently, right arm floor to waist lifting of up to 30 pounds occasionally and 20 pounds frequently, right arm waist to shoulder lifting of up to 15 pounds occasionally and 5 pounds frequently, right arm overhead lifting of up to 8 pounds occasionally and 5 pounds frequently, bilaterally carrying of up to 45 pounds occasionally, right unilateral carrying of up to 30 pounds occasionally, pushing and pulling of up to 35 pounds occasionally, sustained forward and overhead reaching with the right arm limited to frequently with crawling, ladder climbing, gripping, and pinching limited to occasionally.

(Ex. 9, p. 237)

John D. Kuhnlein, D.O., performed an IME at the request of the claimant. Dr. Kuhnlein recorded claimant as having right wrist pain, decreased sensation, and reduced range of motion in the right upper extremity.

He had normal gait, was able to fully squat but complained of bilateral knee pain. (Ex. 11, pp. 264, 283)

The FCE restrictions adopted by Dr. Lawler recommended occasional lifting of up to 45 pounds and 30 pounds frequently from floor to waist and 20 pounds occasionally and 10 pounds frequently for overhead lifting. Using only his right arm, the FCE recommended only 30 pounds occasionally. Dr. Kuhnlein was critical of the conclusions of the FCE.

On more than one occasion, claimant reached the maximum heart rate and the test had to be stopped. Claimant also adjusted his body mechanics during lifts. (Ex. 10, p. 247)

Dr. Kuhnlein recommended a lifting restriction of 10 pounds and that was the restriction set by Dr. Lawler before she received the FCE results.

The 10-pound work restriction is determined to be the appropriate restriction for the claimant based upon his performance during the FCE along with the assessments of Dr. Lawler and Dr. Kuhnlein.

Dr. Kuhnlein assigned a 11 percent whole person impairment for the right wrist pain and 2 percent left lower extremity impairment for the knee injury. Dr. Kuhnlein did not make a causation finding regarding the left lower extremity. (See Ex. 11, p. 264) He imposed light restrictions for the knee of no squatting or kneeling frequently and suggested that the ladder work might be unsafe due to claimant's wrist injury and knee condition. (Ex. 11, p. 266)

Phil Davis, M.S., a vocational specialist, provided a report regarding claimant's loss of access to the job market. (Ex. 18) Mr. Davis characterized claimant's past work history as involving primarily the medium to very heavy physical demand level but that he was not placed in the sedentary work category due to the right hand restrictions. (Ex. 18, p. 299) Mr. Davis billed $1,414.10 for his report and evaluation. There is no itemization of the time spent to prepare or issue the report. (Ex. 20)

On February 11, 2016, Rene' Haigh, MS, issued a vocational report at the request of the defendants. Based on the FCE results, Haigh placed claimant in the medium physical demand category. (Ex. AA, p. 16) Haigh recommended claimant would be suited for security guard position, surveillance operators at casinos, parking enforcement, and dispatcher. (Ex. AA, p. 17) Haigh also recommended job retraining at IowaWORKS to learn keyboarding and computer skills.

Claimant was promoted to Team Leader for gear cutting. It was necessary to modify his job to fit his restrictions. (Ex. 23, p. 323) Claimant believes he was terminated in October 2014 based on his ongoing pain, dysfunction with his right wrist. According to an October 14, 2014, letter, defendant employer claimed that claimant was terminated because there was high turnover and low morale in the department he supervised. Claimant testified credibly that he had never received any reprimands or warnings about his position as supervisor and all previous performance reviews were positive. (Ex. 22, p. 297) It is found that claimant was terminated based, in part, on his functional limitations.

CONCLUSIONS OF LAW

Claimant seeks additional disability benefits from Second Injury Fund of Iowa under Iowa Code sections 85.63--85.69. The Second Injury Fund was created to compensate an injured worker for a permanent industrial disability resulting from the combined effect of two separate injuries to a scheduled member. The purpose of such a scheme of compensation was to encourage employers to hire or retain handicapped workers. Anderson v. Second Injury Fund, 262 N.W. 2d 789 (Iowa 1978). There are

three requirements under the statute to invoke Second Injury Fund liability. First, there must be a permanent loss or loss of use of one hand, arm, foot, leg or eye. Secondly, there must be a permanent loss or loss of use of another such member or organ through a compensable subsequent injury. Third, there must be permanent industrial disability to the body as a whole arising from both the first and second injuries which is greater in terms of relative weeks of compensation than the sum of the scheduled allowances for those injuries. If there is greater industrial disability due to the combined effects of the prior loss and the secondary loss than equals the value of the prior and secondary losses combined, then the fund will be charged with the difference. Id.

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 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).

Claimant's argument is that the assignment of an impairment rating is sufficient to warrant a finding of a first qualifying injury. In support of this, claimant cites Haynes v. Second Injury Fund, 547 N.W.2d 11, 14 (Iowa Ct. App. 1996). The Fund argues that there must be some loss of use of a qualifying member in order to trigger the Fund liability.

The Haynes court said that a specific impairment rating is not a prerequisite to establishing fund liability. Id. at 14. The holding of the Haynes case was not that a permanent impairment always fulfilled the requirements of establishing a fund injury, but that the absence of one was not fatal. In fact, the agency did not find a first qualifying injury in Haynes because of the lack of prior restrictions in addition to the lack of impairment rating.

The second case cited by the claimant also provides little guidance. In *George,* the claimant had been paid a scheduled member loss. Second Injury Fund of Iowa v. George, 737 N.W.2d 141 (Iowa 2007).

In the present case, Dr. Kuhnlein assessed a 2 percent impairment due to the surgery on the claimant's left knee in 1979. Claimant went on to graduate from high school, enter the Navy, and perform mostly medium to heavy duty manual labor jobs up until his wrist injury.

He had a few visits to medical providers regarding left lower extremity pain. In 2001, he reported knee pain. Dr. Johnston suspected it was mild sciatica in the back and not a knee related injury. Claimant returned in 2008 with knee pain again. Dr. Johnston conducted tests which revealed no structural or ligamentous damage. In April 2015, claimant mentioned knee pain again in addition to chronic ongoing low back pain

that radiated down his left leg. Dr. Sutton discharged claimant with a diagnosis of chronic low back pain left knee pain. (Ex. 4, p. 151)

In Bolton v. Second Injury Fund of Iowa, No. 13-1620, 2014 WL 3758345, at *2 (Iowa Ct. App. July 30, 2014), the appellate court upheld a finding that claimant had not carried his burden in showing a first qualifying loss. The injured worker had sustained a knee injury biking to work in 2007. There was no surgery and the injured worker admitted he did not begin to suffer any pain until after he began working for the defendant employer. Dr. Kuhnlein assigned a 1 percent impairment rating based on claimant's subjective reports of pain. While there was no rebutting expert witness, the Appellate Court upheld the agency's decision to not give any weight to Dr. Kuhnlein's opinion. Id. at *3. See Lithcote Co. v. Ballenger, 471 N.W.2d 64, 66 (Iowa Ct. App. 1991) (noting the weight to be given the expert opinion is for the agency, which may accept or reject the opinion, in whole or in part, even if uncontroverted).

In this case, however, claimant had treatment such as the cortisone injection prior to the second injury to the wrist. Dr. Kuhnlein's impairment was not based solely on the claimant's subjective reports. Claimant did have an injury which necessitated surgery in 1979 and it was based on the surgery that Dr. Kuhnlein assigned an impairment rating.

Weighing all of the above, including the other deputies' decisions, it is determined that claimant's 1979 meniscus tear is a first qualifying injury entitling the claimant to benefits from the Second Injury Fund of Iowa.

The next question is the extent of the claimant's disability. All of his prior work was in medium to very heavy duty manual labor category. He has no transferable skills suitable for sedentary work.

While claimant had good grades in high school and did not exhibit or testify to any learning disability, he has no post-secondary education.

In his most recent past, he worked at Power Engineering until his termination in October, 2014. He has undergone five surgeries in his right wrist. In his last visit, he was told he could have another fusion surgery that would reduce mobility or live with the pain and have increased mobility. Claimant has chosen the latter, but he has not found a position that suits his skill set and physical restrictions.

Claimant was working as a supervisor at the time of his termination but he has not been able to find a new supervisory position. Further, the one he did at the time of his termination for defendant employer was one that was heavily modified given that the job description required the use of hand tools and lifting 51-100 pounds constantly. (Ex. 21, 310-12, 16-17)

Mr. Davis, one of the vocational experts, opined that claimant would not be able to perform any of the past occupations he held prior to the injury of September 2011 based on the restrictions set forth by Dr. Kuhnlein that would place claimant in the sedentary work category.

Claimant testified he was terminated when he indicated his wrist was not better and he would be seeking a second opinion. He applied for positions such as security guard and as a counter person at Walmart, Menards and Dey Appliance, among other places. He has not been hired.

Claimant's job searches did taper off after claimant was no longer required to report his job searches to the unemployment office. After his February 2015 surgery, claimant had limitations on the use of his right hand until December 21, 2015.

Based on the 10-pound lifting restriction, which is the most consistent with claimant's medical records, his treatment, and the opinion of Dr. Lawler before the FCE and the opinion of Dr. Kuhnlein, along with claimant's past work history, it is determined that claimant is permanently and totally disabled.

ORDER

THEREFORE, IT IS ORDERED:

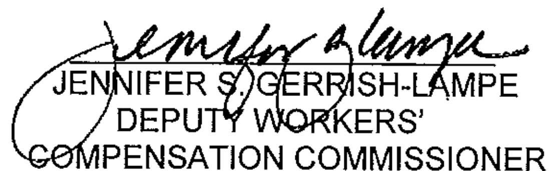
Second Injury Fund of Iowa shall pay claimant benefits for permanent total disability commencing immediately upon termination of the employer's payment of its weekly benefits as agreed to in the settlement with the defendant employer at the rate of four hundred eighty-nine and 92/100 dollars ($489.92).

That the Fund shall pay accrued weekly benefits in a lump sum.

That the Fund shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Costs are taxed to defendants.

Signed and filed this 21st day of June, 2016.



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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.