BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERRY D. ARCHER,	FILED	
Claimant,	APR 26 2018	File No. 5050688
vs.	WORKERS COMPENSATION	ARBITRATION
SECOND INJURY FUND OF IOWA,		DECISION
Self-Insured, Defendant.		Head Note Nos.: 1402.20, 1402.40, 3202

STATEMENT OF THE CASE

Terry Archer, claimant, filed a petition in arbitration seeking workers' compensation benefits from the Second Injury Fund of Iowa (SIF) as defendant. Hearing was held on January 31, 2018 in Cedar Rapids, Iowa.

Claimant, Terry Archer, was the only witness to testify live at trial. The evidentiary record also includes Joint Exhibits JE1-JE7, Claimant's Exhibits 1-4, Defendant's Exhibits A-H.

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.

The parties submitted post-hearing briefs on March 5, 2018.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant has established eligibility for SIF benefits?

2. If so, the extent of claimant's entitlement to SIF benefits.

FINDINGS OF FACT

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

Claimant, Terry Archer, (hereinafter "Archer" or "claimant"), is seeking benefits from the Second Injury Fund of Iowa (hereinafter "SIF" or "defendant"). Archer contends he sustained a first qualifying injury to his left arm on September 25, 2000 and a second qualifying injury to his right arm on November 13, 2012. The second injury occurred while Archer was working for Blahnik Construction Company. Archer and Blahnik Construction Company entered into an Agreement for Settlement (AFS) of the November 13, 2012 workers' compensation injury. This agency approved the AFS on December 7, 2016. In the AFS, the parties stipulated that Archer had sustained a compensable injury to his right upper extremity on November 13, 2012. Blahnik Construction Company agreed to pay to Archer 75 weeks of permanent partial disability (PPD) benefits which is the equivalent of 30 percent functional impairment of the right upper extremity. The commencement date for those benefits was February 17, 2013. (Exhibit B)

On September 25, 2000, Archer was on horseback when the horse was startled and abruptly stopped. Archer was thrown forward off the horse. He fractured and crushed several bones in his left wrist. (Claimant's Ex. 1, page 12; Testimony) On September 29, 2000, he underwent a closed reduction of his left distal radius fracture during which multiple pins were placed. (JE2) Approximately one year later, most of the pins were removed. (Cl. Ex. 1, p. 7) Once the pins were removed, the fractures healed without any further problems. (Cl. Ex. 1, p. 13; Testimony)

It was not until over 16 years after the 2000 left wrist injury that Archer had any permanent restrictions placed on his activities. Claimant's counsel sent him for an independent medical examination (IME) with Sunil Bansal, M.D. on March 24, 2017. Dr. Bansal evaluated both of Archer's upper extremities. Dr. Bansal assigned 30 percent impairment to the right upper extremity as a result of the November 13, 2012 work injury. Dr. Bansal placed permanent restrictions on Archer for the work injury. Those restrictions were no lifting greater than 10 pounds on an occasional basis, no frequent squeezing, pinching, or grasping with the right hand, and to avoid frequent turning or twisting with the right arm. With regard to the left arm, Dr. Bansal assigned 2 percent upper extremity impairment and recommended restrictions for the left arm including no lifting greater than 25 pounds occasionally and no frequent squeezing, pinching, or grasping with the left hand. (Cl. Ex. 1, pp. 16-19)

Archer testified that his left wrist has not been the same since the accident. On occasion his wrist will lock and he needs to grab it with his other hand to pop it. He also feels as though he has a loss of strength. Archer testified that his left upper extremity aches. He has changed the way he lifts some heavy items. He has a knob on his work steering wheel that helps to make it easier for him to turn the wheel with his left hand.

The central dispute in this matter is whether Archer sustained a first qualifying injury. Dr. Bansal assigned permanent impairment to Archer's left upper extremity as a result of the September 25, 2000 injury. Archer testified that he continues to experience problems with his left upper extremity. I find claimant has demonstrated that the September 25, 2000 injury resulted in a loss of use of his left upper extremity and that he sustained permanent impairment.

At the time of the hearing, Archer was 45 years of age. Archer obtained his GED in 1993. Subsequently, he did attend a few community college courses, but he did not obtain any type of certificate or degree. Archer does have a Class A commercial driver's license (CDL) which allows him to drive a tractor-trailer. He also has some basic computer skills. For example, he can pay bills online, use social media, and surf the internet. (Testimony)

From approximately 2000-2013 Archer worked for Blahnik Construction Company building industrial buildings and servicing and performing maintenance of equipment. Archer was responsible for transporting project materials and equipment in support of other trade workers. His work varied, depending on the project, some days the majority of his time was spent driving while other days the majority of his time was spent more directly involved in the project. He was laid off from this job on March 5, 2013. He was paid $24.68 per hour, plus benefits. Following his lay-off Blahnik did offer him part-time work in April of 2013. Archer declined that employment offer because he had already found a full-time position with Zinser's. Archer feels he would not be capable of returning to that position because his right upper extremity could not handle the required lifting and loading. (Testimony)

At the time of the hearing, Archer was working full-time for Zinser's earning $22.00 per hour. He does not receive benefits such as health care or pension. He works as a driver. He also maintains equipment. He does hook and unhook the trailer. He drives a 2018 tractor. He spends the majority of his time driving a 13-speed truck. He has a knob on the steering wheel to help make turning easier. Shifting causes him difficulties, especially on shorter trips where more frequent shifting is required. On occasion Archer does have to drive an older truck which is a bit more difficult to shift. Archer intends to remain at his current job. He does not have to perform much hands-on work in this job. His duties mainly consist of performing the pre-trip inspection and driving. He is only required to lift up to 25 pounds on an occasional basis. This job is less strenuous than his job at Blahnik where he had to perform loading, securing, and help with unloading. Archer testified that if he had to perform that type of work, he believes his symptoms would be ten times worse. However, Archer was released to return to full duty work, normal duties on February 19, 2013 by Dr. Pardubsky. He returned to his full-time job until he was laid off on March 5, 2013. (Testimony)

The only physician to assign any restrictions to Archer is Dr. Bansal in his March 2017 report. Up until that report, Archer had been working without any restrictions placed on his activities by a medical provider for over 16 years since his left upper extremity injury and over 4 years since his right upper extremity injury. No physician who provided any treatment to Archer assigned him any restrictions for either upper extremity. Archer also passed DOT physicals on October 18, 2013 and July 31, 2015 with no restrictions other than wearing contact lenses. Further, Dr. Bansal restricted Archer to lifting 10 pounds on an occasional basis yet Archer testified that in his current job he lifts up to 25 pounds on an occasional basis. I do not find Dr. Bansal's restrictions to be persuasive. I find the opinions of the treating medical providers who did not assign any permanent restrictions to carry greater weight. (JE5, p. 3; JE7, p.1;

Testimony) I find that Archer has no permanent restrictions as the result of the September 25, 2000 or November 13, 2012 injuries.

There are two vocational reports in evidence. Claimant relies on the report of Barbara Laughlin, M.A. Ms. Laughlin's opinions are premised on Archer having restrictions as set forth by Dr. Bansal. I did not find Dr. Bansal's opinions to be persuasive. Thus, I do not find Ms. Laughlin's opinions to be persuasive. (Cl. Ex. 2)

Defendant relies on the vocational report of Rene Haigh, MS, CRC. Archer testified that he never met with Ms. Haigh. In her report she states that because Archer did not have any permanent restrictions he did not sustain any loss of access to the labor market. (Ex. F)

Although I found Archer does not have any permanent restrictions placed on his activities as a result of the September 25, 2000 or November 13, 2012 injuries, he does still experience some problems. Archer testified that he experiences pain in his right upper extremity on a daily basis. He has swelling on the inside portion of his right elbow with sharp pain. His pain increases when he grips or pulls. He also experiences numbness and tingling in his fingers. His middle finger is painful when chilled. He testified he has over a 60 percent loss of strength in his right upper extremity. Lifting causes sharp pain in his arm. He also has problems with gripping. He cannot lift objects with only his right arm. He treats his symptoms with Aleve, ibuprofen, and ice. He wears a pressure sleeve on his right upper extremity at work. (Testimony)

He also continues to have problems with his left upper extremity. He experiences aches and the loss of some strength. He also has problems with his wrist locking up. He has learned to change the way he lifts heavy things with his left upper extremity. (Testimony)

Considering his age, educational background, employment history, ability to retrain, motivation to continue working, length of healing period, permanent impairment, and lack of permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 20 percent loss of future earning capacity as a result of the injuries.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

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.

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).

In order to state a valid claim against the Fund, an employee must demonstrate that he previously has either lost or lost the use of a hand, arm, foot leg or eyes. Iowa Code section 85.64; Second Injury Fund v. Shank, 516 N.W.2d 808, 812 (Iowa 1994). The loss need not be total, merely permanent. Irish v. McCreary Saw Mill, 175 N.W.2d 364, 369 (1970). The employee must prove permanent impairment resulted from the first injury, whether by a permanency rating and/or by other credible evidence or work restrictions. Haynes v. Second Injury Fund, 547 N.W.2d 11, 14 (Iowa App. 1996).

The initial dispute between the parties is whether the claimant has proven a qualifying first injury. There is no doubt that claimant sustained a traumatic injury to his left hand on September 25, 2000. Having found that Archer sustained two percent permanent functional impairment to his left upper extremity, as assigned by Dr. Bansal, I conclude that he has established, by a permanency rating, that he sustained permanent impairment as a result of the first injury. Therefore, I conclude that Archer has shown by a preponderance of the evidence that he sustained a qualifying first injury to his left upper extremity. There was no dispute that the claimant sustained a second qualifying injury.

Having determined that claimant sustained a qualified first and second injury, I now turn to the extent of permanent disability. 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 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 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).

Iowa Code section 85.64, provides a means for injured workers to obtain these disability benefits that exceed the amount attributed to the first and second injury, which provides in pertinent part:

> In addition to such compensation, *and after the expiration of the full period provided by law for the payments thereof by the employer*, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the

> degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ. (Emphasis added.)

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, 593; 258 N.W. 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. Based on the above findings of fact, I conclude claimant sustained 20 percent industrial disability for the combined effect of the qualifying first and second injuries. Thus, claimant has shown entitlement to 100 weeks of permanent partial disability benefits. The parties have stipulated that the Fund is entitled to a credit of 75 weeks at the weekly rate of six hundred eighteen and 34/100 dollars ($618.34). Therefore, the SIF shall pay claimant 25 weeks of permanent partial disability benefits at the stipulated rate. The parties agree in the Hearing Report that the commencement date for SIF permanent partial disability benefits is August 31, 2014.

Interest on accrued benefits owed by the Second Injury Fund do not begin until the date of the commissioner's order. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467, 473 (Iowa 1990).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of six hundred eighteen and 34/100 dollars ($618.34).

The Second Injury Fund shall pay twenty-five (25) weeks of permanent partial disability benefits commencing on the stipulated commencement date of August 31, 2014.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 26th day of April, 2018.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.