

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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DORAN BUSH,	:	File No. 5066853
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Claimant,	:	ARBITRATION DECISION
	:	
vs.	:	
	:	
SECOND INJURY FUND OF IOWA,	:	
	:	
Defendant.	:	Head Notes: 1108.50, 1402.20, 1402.40, 1803, 2907, 3202

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## STATEMENT OF THE CASE

Doran Bush, claimant, filed a petition for arbitration against defendants, Prairie Farms Dairy, as the employer, and Indemnity Insurance Company of North America, as the insurance carrier. Mr. Bush also asserted a claim against the Second Injury Fund of Iowa in this file. Prior to hearing, claimant and the employer reached an agreement for settlement that resolved the pending claim against the employer and insurance carrier. Claimant proceeded to hearing against the Second Injury Fund of Iowa.

An in-person hearing occurred on November 25, 2019 in Des Moines, Iowa. The evidentiary record includes joint exhibits 1 through 5, claimant's exhibits 1 through 9 and defendant's exhibits A through J. Claimant testified on his own behalf. The Second Injury Fund did not call any witnesses to testify live at hearing.

The evidentiary record closed on November 25, 2019 at the end of the live hearing. The parties were given until January 10, 2020 to file their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

## ISSUES

The parties entered into numerous stipulations on the hearing report submitted at the time of hearing. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be discussed.

The parties submitted the following disputed issues for resolution:

1. Whether the alleged April 6, 2017 injury qualifies as a second injury for purposes of the Second Injury Fund of Iowa.
2. Whether claimant sustained a prior qualifying loss to the right arm in November of 2016.

3. The extent of claimant's entitlement, if any, to permanent partial disability benefits as a result of the combined effects of the alleged injuries.

### FINDINGS OF FACTS

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

Claimant, Doran Bush, is a 51-year-old, left-hand dominant man. He lives in Asbury, Iowa. Mr. Bush graduated from high school in 1986. He was a below average student. After high school, he attended the University of Dubuque for one semester in 1987. However, he decided college was not a good fit for him. (Testimony)

During high school Bush worked for Nickolas Landscaping in Dubuque as a laborer. He worked part-time during the school year and full-time in the summers. During high school he also worked as a bus boy in a restaurant. After high school Bush worked for a computer accessory business in their packaging department. His work history also includes working as a tool room apprentice for approximately one year. He worked as a truck mechanic from approximately 1989 to 1998. He then drove trucks until approximately 2004. Next he opened his own landscaping business. He worked sodding, seeding, and planting bushes. He closed this business in 2008 because business was slow. Bush returned to truck driving until 2014 when he was hired by Prairie Farms Dairy in Dubuque, Iowa. He worked for Prairie Farms Dairy as a delivery driver. He was paid \$.52 per mile and \$22.50 for unloading time. His gross weekly earnings in 2017 were \$1,357.03. (Testimony; Hearing Report)

In November of 2016, Bush was working at Prairie Farms Dairy as a semi-driver when he sustained an injury to his right arm. Bush backed the truck up to a dock to make a delivery. He exited his truck and was walking towards the door of the building when he fell and landed on his right arm. Since the November 2016 fall, Bush's right upper extremity, outside of his hand, and fingers go numb. (Testimony)

Bush alleges he sustained an injury which arose out of and in the course of his employment with Prairie Farms Dairy on April 6, 2017. Bush was making a delivery, stepped out of his truck and into a hole in the ground, he twisted his left ankle and fell onto his left side. He notified his employer of his injury via text message to Joe Kirk. He did not receive a response from Joe. He was able to complete his work day. Bush is not aware of any accident reports surrounding this injury. (Claimant's Exhibit 7; Cl. Ex. 2, p. 8; testimony)

Bush continued to perform his regular job. His left ankle sprain resolved. However, his hand symptoms progressed. The outside of his hand was constantly numb. He worked full time without any restrictions or formal accommodations until April 3, 2018 when a pallet of milk tumbled and hit Bush in the head and torso. He was diagnosed with a head injury and neck strain. The medical provider recommended rest

and took him off work. Bush returned to work without restrictions a few days later. (Testimony)

Bush did not receive treatment for his left upper extremity until after he sustained another injury to a different body part. Bush explained that he did not seek treatment for his left upper extremity earlier because he was focused on his right upper extremity symptoms which were flaring and the predominant problem. Bush also testified that his symptoms would vary depending on his activities. He was hesitant to request treatment for his left upper extremity because his employer had a history of finding a way to get rid of injured employees. Because of that history, Bush did not want to push the subject of his work injury. (Testimony)

An August 7, 2018 EMG demonstrated ulnar neuropathy at the left elbow. On November 7, 2018, Edwin Castaneda, M.D. performed a decompression of the ulnar nerve at the left elbow. He was later released to return to work without restrictions. (Joint Exhibit 4, p. 4; JE5, pp. 1-2; testimony)

At the request of his attorney, Bush saw Sunil Bansal, M.D. for an independent medical evaluation. Dr. Bansal diagnosed Bush with left elbow compressive neuropathy of the ulnar nerve as a result of the April 6, 2017 work injury. Dr. Bansal opined that Bush's mechanism of falling and landing on his left elbow was consistent with his traumatic cubital tunnel syndrome. Bush continued to have pain in his left hand, including his fourth and fifth fingers. He still experienced complete numbness of his forearm in the ulnar distribution after the surgery. He also noted decreased grip strength. Bush reported that his fourth and fifth finger felt twisted. Dr. Bansal assigned 6 percent functional impairment for the left upper extremity. He restricted Bush to no lifting greater than 20 pounds with his left hand, and no repetitive gripping or lifting with the left hand. (JE2)

Bush testified that since the time of the surgery, he does not have any feeling in his left hand, including his pinky finger and ring finger. Additionally, he testified there was no feeling in his left elbow.

Prior to trial in this case, claimant resolved his left arm claim for the alleged injury date of April 6, 2017 with the employer. The case against the employer was resolved via an Agreement for Settlement. (Cl. Ex. 9)

A signed copy of the settlement agreement was introduced by claimant as exhibit 9. Signed copies were filed with the agency and approved. Administrative notice is taken of the settlement agreement and the fact that it has been approved since the date of the hearing.

Claimant contends that the applicable permanent functional disability for the left arm is six percent, as agreed upon in the Agreement for Settlement. (Ex. 9) The Second Injury Fund is not a party to nor bound by the settlement agreement between the claimant and the employer.

The Fund argues that Bush did not sustain any permanent impairment from the alleged April 6, 2017 work injury. In support of their position, they point to the gap in treatment after the April 6, 2017 injury. However, I found Bush's testimony at hearing which explained the gap in treatment to be credible. The Fund also relies on the opinion of Dr. Kennedy who indicated she felt his left hand symptoms "could be" related to a personal condition. (JE3, p. 30) The Fund relies on the history portion of a clinical note from Dr. Castaneda to try to argue that Dr. Castaneda causally connects the left upper extremity complaints to an April 2018 injury. I do not find the Fund's arguments to be persuasive. I find Dr. Bansal's opinions to be based on a complete history and most persuasive. Thus, I find Bush sustained six percent functional impairment of his left upper extremity and is permanently restricted to no lifting greater than 20 pounds and no repetitive gripping or lifting with the left hand as the result of the November 6, 2017 work injury. Thus, I find Bush sustained a second qualifying injury.

We now turn to the injury Bush sustained in November of 2016, when he fell on ice and injured his right arm. At the time of the fall, Bush was making a delivery for Prairie Farms Dairy, Inc. After the fall he completed the delivery and then called his supervisor to report the injury. The Fund did not offer any testimony to refute the fall of 2016. They did point to an email sent by the employer, but I find the sworn testimony of Bush to be more persuasive than the speculative email sent by the employer. I find that Bush did sustain a fall in November of 2016. (Testimony; JE3, p. 24)

Since the November 2016 fall, Bush's right upper extremity, outside of his hand, and fingers go numb. The extent and severity of the numbness depends on his activities. In August of 2018 an EMG confirmed abnormalities in his right upper extremity and hand. In December of 2018, Dr. Castaneda performed a decompression of Bush's ulnar nerve right elbow and carpal tunnel release of his right hand. (Testimony; JE4, p. 3; JE5, p. 3)

As a result of the November 2016 injury at Prairie Farms Dairy, Inc., Dr. Bansal diagnosed compressive neuropathy of the median and ulnar nerves at the right wrist. He assigned two percent functional impairment for Bush's right upper extremity and hand. He permanently restricted Bush to no repetitive turning or twisting of his right hand. (CL. Ex. 2, pp. 8-12)

Bush testified that he still does not have any feeling through his right elbow and in his palm, middle finger, and ring finger. His pain and numbness are not constant; they come and go, depending on his activities. (Testimony)

With regard to Bush's right upper extremity, I do not find the Fund's arguments to be persuasive. I find Dr. Bansal's opinions to be based on the most complete history and his opinion to be the most persuasive. Thus, I find Bush sustained two percent functional impairment of his right upper extremity and is permanently restricted to no repetitive turning or twisting of his right hand as the result of the November 2016 work injury. Thus, I find Bush sustained a first qualifying injury.

At the time of the hearing, Bush was no longer working for Prairie Farms Dairy, Inc. His job description from Prairie Farms Dairy, Inc. requires him to be able to lift 50 pounds. (Cl. Ex. 4) Clearly, the restrictions as set forth by Dr. Bansal do not allow Bush to perform his prior job. The Fund argues that the reason Bush is no longer employed with Prairie Farms is due to a shoulder injury. Unfortunately, the evidentiary record does not support this theory. The Fund's argument is speculative at best. Based on the evidence before me, I find that Dr. Bansal's upper extremity restrictions prevented Bush from performing his job at Prairie Farms. Additionally, Dr. Bansal's restrictions prevent Bush from returning to many of his prior jobs.

Bush was motivated to remain in the workforce and was able to obtain a "no touch" trucking job. Bush testified he was grateful that a friend hired him for this position. At the time of hearing, he was working for Hallahan Trucking. At the time of the injury Bush made approximately \$65,000 to \$70,000 per year, plus benefits. At Hallahan, he expects to earn around \$40,000 per year.

Considering claimant's age, educational background, employment history, functional impairments, permanent work restrictions, his ability to return to work, his limited ability to retrain, as well as claimant's motivational level and all other factors of industrial disability outlined by the Iowa Supreme Court, I find that claimant sustained a 30 percent loss of future earning capacity.

#### CONCLUSIONS OF LAW

Mr. Bush has resolved his claim against the employer. This case involves a claim for Second Injury Fund 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); 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 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

The Second Injury Fund disputes whether claimant has proven a second qualifying injury. Claimant contends that his left upper extremity injury constituted a second, qualifying injury. The Second Injury Fund contends claimant cannot prove a second qualifying injury and is not entitled to benefits pursuant to Iowa Code section 85.64.

I do not find the Fund's argument to be persuasive. Based on the above findings of fact, I conclude that Bush's work injury on April 6, 2017 resulted in permanent functional impairment and necessitated permanent restrictions. I conclude Bush lost the use of his left arm through a compensable injury. I further conclude he sustained a second qualifying injury.

The Fund also disputes whether Bush has proven a first qualifying injury. Bush contends that his right upper extremity injury that he sustained in November of 2016 constitutes a first qualifying injury. Based on the above findings of fact, I conclude Bush sustained an injury to his right upper extremity in November of 2016 which resulted in permanent functional impairment and necessitated permanent restrictions. I conclude he lost the use of his right arm due to the November 2016 injury. Thus, I conclude claimant has demonstrated that he sustained a first qualifying loss.

I conclude that claimant has established he sustained two separate and distinct injuries. The first, to the right arm, occurred in November of 2016. The second, the left arm injury, occurred on April 6, 2017. Therefore, I conclude that claimant has proven two qualifying injuries and entitlement to benefits from the Second Injury Fund of Iowa. Iowa Code section 85.64.

The next legal issue to be determined is the extent of claimant's entitlement to permanent disability as a result of both injuries. In making this determination, the agency must ascertain the claimant's loss of future earning capacity, or industrial disability, resulting from both injuries.

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 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, 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).

Considering all of the industrial disability factors, I found that Mr. Bush proved a 30 percent loss of future earning capacity as a result of the combined effects of his right arm and left arm injuries. Industrial disability benefits are paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code section 85.34(2)(u). Therefore, I conclude that claimant is entitled to an award of 150 weeks of permanent partial disability benefits as a result of the combined effects of the November 2016 right arm injury and the April 6, 2017 left arm injury. The parties stipulated that in the event of an award, the Fund is entitled to 20 weeks of credit under Iowa Code section 85.64. Thus, the Fund shall pay claimant 130 weeks of permanent partial disability benefits.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated weekly rate of eight hundred forty-four and 69/100 dollars (\$844.69).

The Second Injury Fund of Iowa shall pay claimant one hundred thirty (130) weeks of permanent partial disability benefits commencing on the stipulated commencement date of January 10, 2020.

All accrued benefits shall be paid in lump-sum.

Signed and filed this 11th day of March, 2020.



ERIN Q. PALS  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Peters (via WCES)  
Jonathan Bergman (via WCES)  
Eric Loney (via WCES)  
Randall Schueller (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.