BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
APR 20 2017
WORKERS COMPENSATION

| | | |
|---|---|---|
| DAVID VSETECKA, | : | File No. 5053706 |
| Claimant, | : | ARBITRATION DECISION |
| vs. | : | |
| SECOND INJURY FUND OF IOWA, | : | |
| Defendant. | : | Head Note Nos.: 1803, 3202, 4100 |

## STATEMENT OF THE CASE

David Vsetecka, claimant, filed a petition in arbitration seeking workers' compensation benefits from the Second Injury Fund of Iowa, defendant. The arbitration hearing was held on October 27, 2016. The parties filed post-hearing briefs on December 2, 2016 and the matter was considered fully submitted at that time.

The evidentiary record includes Claimant's Exhibits 1 through 8 and 11, and Second Injury Fund Exhibits A through M. At the hearing, claimant and his spouse, Robin Vsetecka both provided testimony.

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

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a qualifying first injury to allow a Second Injury Fund claim.

2. Whether claimant is an odd-lot worker.

3. The extent of any permanent disability.

4. The credit applicable to the Second Injury Fund.

## FINDINGS OF FACT

After reviewing the evidence presented, I find as follows:

Claimant was 49 years old at the time of the hearing. (Transcript page 41) He graduated from high school in 1986. (Tr. p. 42) Claimant has no additional college or formal vocational training. (Id.) Claimant received on-the-job training as a welder. (Tr. p. 43) He does not have any significant computer skills. He is right-hand dominant. (Id.)

Claimant and defendant have stipulated to a second injury date of July 1, 2014, that arose out of and in the course of his employment with L & R Manufacturing, and that the injury was the cause of both temporary and permanent disability. (Hearing Report, p. 1) The Second Injury Fund agrees that this second injury involving claimant's right arm is a qualifying second injury (Second Injury Fund's Post-Hearing Brief, p. 16). The claim against the employer concerning the second injury was resolved via an Agreement for Settlement, prior to the hearing. (Ex. A) In the Agreement for Settlement, which was approved by this agency on August 25, 2016, claimant and the employer identified a 12 percent loss of the right upper extremity, resulting in 30 weeks of compensation under Iowa Code section 85.34(2)(m), which relates to an injury to the arm. (Ex. A, pp. 1-2)

On July 1, 2014, claimant was working at L & R Manufacturing and was building a steel frame about 42 inches wide and 22 inches tall and weighed between 100 and 200 pounds. (Tr. p. 47; Ex. 3, p. 11) He and a co-worker were flipping the structure over on a table and it slipped off the table, pulling his wrist. Claimant felt a pop in his right wrist. (Tr. pp. 47-48; Ex. 3, p. 9)

Claimant's work history begins with his first job following high school at Featherlite, in Cresco, Iowa where he received on-the-job training and worked as a welder until 1988. (Tr. p. 43)

Claimant was employed seasonally with Reicks Farms as a laborer. This work was done as a second job in addition to his regular employment. Claimant stopped performing this seasonal work before the July 1, 2014 injury to his right wrist, to spend more time with his family. (Tr. p. 44)

Claimant voluntarily left Featherlite to work at L & R Manufacturing. (Ex. H, p. 3; Tr. p. 43) The job at L & R Manufacturing allowed claimant to work closer to home and with better pay. He worked at L & R Manufacturing as a welder/fabricator and supervisor/shop foreman. Claimant worked for this employer for 27 years from 1988 until January 2015. (Ex. H. p. 3; Tr. pp. 42-43) He was terminated from this employment on January 16, 2015, four days after returning to work following a period of about six months off work after surgery on his injured wrist. (Ex. J. p. 5; Tr. pp. 50-52,

59) Claimant was told he was terminated because the company "didn't need me for six months, that he had to let me go and supposedly [I] was rude to a customer or him." (Tr. p. 52) Claimant stated that "[t]here was one incident where there was a misunderstanding, that I might have been rude . . ." (Tr. p. 53) However, claimant testified that he was never told what the specific incident was that led to his termination. (Id.) He stated that the only incident he could think of actually occurred prior to the work injury. (Id.) The employer generally indicated that he was terminated due to belligerence, problems with co-workers and customers and a negative attitude that resulted in performance issues. (Ex. J, p. 5) Claimant was earning $19.50 per hour at the time of his termination. (Tr. p. 61)

Following his termination from L & R Manufacturing, claimant received unemployment benefits. (Tr. p. 87)

In April, 2015, claimant began working for Dave and Donna Karnik, doing farm work in the fields, driving a truck and repairing trucks. (Tr. pp. 59-61) He earned $18.00 per hour and worked 60-75 hours per week. (Tr. p. 60) Claimant testified that while working for the Karniks he used his left hand a lot to wrench and pull on the equipment, because he had some difficulties using his right hand. (Tr. pp. 61-62) He also described pain in his knees, particularly when driving a truck. (Tr. p. 62)

In early July, 2015, claimant left his job with the Karniks for a job at Wiltgen Manufacturing, because it offered fewer hours and some benefits, although he did not have health insurance with this employer. (Tr. p. 63) At Wiltgen, claimant did the same type of welding and fabrication work that he had performed at L & R Manufacturing. Claimant testified that this job was heavy work. (Id.) He was paid $19.00 per hour. (Id.) He worked there until about December 20, 2015. (Id.) Claimant had difficulties with his wrist while performing this job and was sometimes able to use his left hand or ask for help. (Tr. p. 64) He also had pain in his knees. (Id.)

Claimant left Wiltgen Manufacturing for a job at Homeland Energy, which is an ethanol plant. (Tr. pp. 64) Claimant started this job on December 23, 2015, working in the maintenance department, and continued to be employed at Homeland Energy at the time of the hearing, working 40 to 50 hours per week. (Tr. pp. 64-65, 102) He described his job as keeping "the plant running," which involves maintaining and replacing belts, gearboxes, augers, conveyors and welding. Claimant described it as "[h]eavy work." (Tr. p. 65) Claimant's starting pay was $19.00 per hour and increased to $20.00 per hour. (Tr. pp. 65, 103) This job provided claimant with additional benefits, including health insurance. (Tr. p. 65) He testified that he has difficulties with his wrist in this job from wrenching, fixing and greasing the machines. (Tr. p. 65) He also stated that he has some difficulties with his knees from climbing ladders, crawling and using steps. (Tr. p. 66)

In addition to the jobs that claimant obtained after his wrist injury, he inquired about or applied for about 18 other jobs. (Ex. H, p. 9) He was offered positions at four

of those employers, but did not accept those jobs because the pay was not sufficient to support his family, or he chose to accept a different offer of employment. (Ex. H, p. 10) I find that claimant has maintained a consistent work history both before and after the wrist injury.

Stanley Matthew, M.D., of St. Luke's Hospital, on April 24, 2016, recommended work restrictions following an independent medical evaluation (IME) regarding the right wrist injury. (Ex. 1, p. 4) He assigned restrictions of: avoid lifting more than 20 pounds; avoid repetitive motion of the wrist; and, avoid repetitive use of the right hand. (Id.) On July 27, 2016, Dr. Matthew issued a report concerning claimant's bilateral knees and recommended restrictions of: no lifting more than 20 pounds; no prolonged standing, walking bending, or squatting; and no repetitive use of stairs or ladders. (Ex. 1, second numbered page 4)

Claimant testified that in the performance of his current job at Homeland Energy, he violates the restrictions recommended by Dr. Matthew on a daily basis by: lifting over 20 pounds; engaging in repetitive motion of his right wrist, repetitive use of his right hand; and, engaging in prolonged standing, walking, bending and squatting. (Tr. pp. 66-67) Claimant said he continues to work in violation of the recommended restrictions because, "[t]hat's my job," and because of his desire to support his family. (Tr. p. 68) Claimant said after a day of work, he is "[e]xhausted" and that he takes Aleve or ibuprofen daily. (Id.) He plans to continue working "[a]s long as I can take it." (Id.) He believes that he would likely lose his current job if he tried to work under the above stated restrictions and that if he did not have his present job, that he would be unable to find any work that he could do within Dr. Matthew's assigned restrictions. (Tr. p. 69)

Claimant identified in his petition a first injury related to a congenital knee condition. Claimant testified that when he was born, his kneecaps did not develop and are undersized and have worn out to the point of being bone-on-bone, which causes pain that limits his activities. (Tr. p. 42) Specifically, claimant pled a first injury to his right knee only. (Claimant's Petition) However, he agreed that the condition affects both of his knees. (Tr. p. 73)

Claimant described his knee condition as one that prevented him as a young person from playing sports, running, jogging, and riding a bicycle. (Tr. p. 42) He said that he refrained from those activities due to the pain, but that when he needed to work, he just worked through the pain. (Id.)

Concerning claimant's right knee, he was seen at Gundersen Lutheran Medical Center on March 3, 2014, about four months prior to the wrist injury, complaining of stiffness and swelling in his right knee. (Ex. 3, p. 1) He reported that he had problems with his right knee in the past, and had it drained a few times and received cortisone shots. He was sent for x-rays and an appointment was scheduled with Andrea Wilson, an orthopedic PA. (Ex. 3, p. 2)

On March 6, 2014, claimant was seen by Ms. Wilson who indicated that claimant "had a long history of ongoing knee problems since he was young as he has had noted underdevelopment of the patellae bilaterally and has had on-and-off pain as a consequence." (Ex. 3, p. 2) At that time, claimant reported that he had not had physical therapy or surgical intervention concerning his knees in the past. (Ex. 3, p. 3) He was noted to have "[r]ight knee pain secondary to severe patellofemoral osteoarthritis and underdeveloped patellae in addition to surrounding strain of the knee due to a recent fall." (Ex. 3, p. 4) It was found that the patellofemoral osteoarthritis was "due to his patellofemoral development and that the components required for replacement are likely too large for this." (Id.) Physical therapy and Synvisc injections were recommended and potential surgery was discussed. (Id.) Claimant elected to proceed with the injection and physical therapy was ordered. (Id.)

On March 21, 2014, claimant was seen in follow-up for his right knee pain and noted that his pain and swelling had improved, but he still had pain "all the time with all activities." (Ex. 3, p. 5) Surgery was discussed again as a potential option, but claimant indicated that he would like to "postpone this if at all possible until fall or later." (Ex. 3, p. 6)

On April 9, 2014, claimant had another follow-up appointment for knee pain, noting that "he has had pain in his knees all of his life," which "has increased over the past few months." (Ex. 3, p. 6) He notes pain with walking and using stairs. He indicated that "[g]etting out of a chair and getting out of a car is painful," and kneeling causes significant pain. (Id.) He also noted that the right knee is worse than the left. (Id.) At that time, there was a recommendation for total knee arthroplasty, and claimant wanted to pursue the recommended surgery. (Ex. 3, p. 8)

Claimant then sustained the right wrist injury on July 1, 2014.

On August 13, 2014, claimant presented to Michael Kalinosky, D.O., at the request of Dr. Lawrence for consultation of possible bilateral total knee replacement, with a tentative surgery date of December 8, 2014. (Ex. 3, p. 52) He described "[p]ain [that] has plagued him since his youth." (Ex. 3, p. 53) At this time, claimant determined to just go on living with the pain, and he has no plans for surgery in the future. (Ex. 3, p. 58; Tr. p. 77) Claimant stated that it is his understanding that surgery may not resolve his knee problems due to the deteriorated state of his kneecaps. (Tr. p. 77)

On July 27, 2016, Dr. Matthew issued a report following an IME of claimant's bilateral knees. (Ex. 1, second page 1) Dr. Matthew concluded that claimant had a pre-existing condition in both knees and that the underdevelopment of his patellas have caused knee pain, on and off throughout his life. He then assigned a 20 percent whole person impairment rating for his bilateral knees based on table 17-8 of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, as a result of "chronic [muscle] weakness, loss of strength, and degeneration of both knees." (Ex. 1, second page 4) Dr. Matthew assigned restrictions of "no lifting of more

than 20 pounds, no prolonged standing, walking, bending, squatting, no repetitive stairs, no use of ladders." (Id.)

Claimant's spouse testified that claimant still goes on long walks, despite his knee issues. (Tr. p. 32)

As stated above, claimant sustained a work injury to his right wrist on July 1, 2014. The date of the injury and the fact that it is a cause of both temporary and permanent disability is stipulated by the parties on the hearing report.

Following the July 1, 2014, wrist injury, claimant was seen at Gundersen Clinic where Andrea Wilson, PA-C, was suspicious of a scapholunate ligament tear and recommended further evaluation with a specialist. (Ex. 3, pp. 11-12) An MRI of the wrist was conducted on July 28, 2014, and showed results "suspicious for a scapholunate ligament disruption" in his right wrist. (Ex. 3, p. 25)

On July 29, 2014, Charles Hayden, M.D., performed surgery on claimant's right wrist. (Ex. 5, p. 38) The procedure was a scapholunate ligament reconstruction and carpal tunnel release. (Id.)

Claimant was off work following surgery for about six months as no light duty work was available at L & R Manufacturing. (Tr. p. 50) He returned to work, full-duty on January 12, 2015. (Ex. B, p. 7)

On August 4, 2014, claimant was seen by Stacey Glaunert, PA-C, of the Gundersen Clinic, and reported that "he has had absolutely no paresthesias since the surgery, so that numbness in his hand is completely resolved." (Ex. 3, p. 50)

On August 11, 2014, claimant returned for a follow-up visit and it is again noted that "[h]is paresthesias have resolved." (Ex. 3, p. 49) However, it is also noted that claimant had "some tingling in his fingers on a couple of occasions but they are much improved in comparison to what they were." (Ex. 3, pp. 49, 52)

On October 20, 2014, claimant was seen by Dr. Hayden, about three months after his surgery. It is recorded that at that time, claimant had "no pain in his wrist," although he "still [has] slight numbness in the median distribution." (Ex. 3, p. 94)

On January 12, 2015, about five and one-half months after surgery, claimant was seen by Dr. Hayden who recorded that claimant had "no wrist pain." (Ex. 3, p. 101) Claimant advised that "he feels that his wrist is almost back to normal," and his "[s]ensation is intact," although, he was described as having reduced range of motion in his wrist and reduced grip strength. (Id.) Dr. Hayden stated that claimant had reached the end of his medical treatment and that no further treatment was expected. (Id.) Dr. Hayden stated that "[t]here is no impairment rating. He has no restrictions." (Id.) Claimant's spouse testified that claimant did not want work restrictions at that time,

because he was unable to return to his job at L & R Manufacturing with any restrictions. (Tr. p. 21)

On April 24, 2016, Dr. Matthew issued a report following an IME, as mentioned above. He noted that claimant's range of motion in his right wrist was limited by pain and swelling and his right grip strength was severely limited and greater than 30 percent loss, compared to the left. (Ex. 1, pp. 2-3) Dr. Matthew also noted decreased sensation in the median and radial nerve distribution below the forearm. (Ex. 1, p. 3) Dr. Matthew, based on the AMA Guides, Fifth Edition, Table 16-34, assigned a 20 percent upper extremity impairment based on loss of strength, and converted the impairment to 12 percent of the whole person, using Table 16-3. (Id.) Also, based on Table 16-5, he assigned a 30 percent impairment to the upper extremity due to loss of sensation, which he converted to 18 percent of the whole person. (Id.) Dr. Matthew then apparently combines the 12 percent and 18 percent to arrive at a 30 percent whole person rating for the right hand/arm injury. However, it is apparent that he did not utilize the combined values chart at page 604 of the AMA Guides to arrive at this final whole person rating, as 18 percent plus 12 percent produces a 28 percent whole person rating, according to the combined values chart of the AMA Guides, Fifth Edition.

Dr. Matthew, recommended work restrictions concerning the right wrist injury and also concerning the bilateral knees, which are described above.

On June 14, 2016, following an IME, R. L. Broghammer, M.D. of Medical Review Services, issued a report at the request of the employer. (Ex. B. p. 1) Claimant reported to Dr. Broghammer that he had pain in the dorsal aspect of the wrist, the thumb, and metacarpal joint of the right thumb as well as the first dorsal compartment. (Ex. B, p. 7) He complained of numbness and tingling in all four fingers on his right hand, decreased grip strength and loss of range of motion in the wrist. (Ex. B, p. 8) Dr. Broghammer determined that claimant did have reduced range of motion, but stated that his sensory loss was "subjectively decreased" and "[t]he etiology of this is unclear." (Ex. B, p. 9) He also stated that it was "unclear" why claimant could not make a complete fist with the right hand. (Id.) Dr. Broghammer stated that claimant's sensory difficulties are not supported by the medical record and he relies, in part, on the record of claimant's post-operative follow-up appointments which indicate that the pre-operative paresthesia had resolved. (Ex. B, p. 10; Ex. 3, pp. 49-50) I note that the post-operative records do initially note resolution of the numbness, but that later records indicate that claimant had some ongoing numbness and tingling. Dr. Broghammer assigned a four percent impairment to the upper extremity based on loss of range of motion. (Ex. B, p. 10) He does not assign any impairment for sensory loss or decreased strength. (Ex. B, pp. 10-12) Dr. Broghammer agrees with the opinion of Dr. Hayden, that claimant does not require any permanent work restrictions. (Ex. B, p. 14)

On July 28, 2016, claimant was seen by Jeffrey Westpheling, M.D., for the purpose of an IME. (Ex. D, p. 1) At that time, claimant described pain of the dorsal

area of his right wrist that is aggravated with gripping and twisting, along with some numbness and tingling. (Ex. D, p. 2) Dr. Westpheling agreed with Dr. Broghammer's assessment of 4 percent impairment of the right upper extremity based on decreased range of motion. (Ex. D, p. 3) However, the report lacks any clear measurement of range of motion. Dr. Westpheling rejects Dr. Matthew's assessment of 30 percent impairment due to neuropathy/loss of sensation. Dr. Westpheling argues that pre-operatively, claimant had numbness and tingling in his index and ring fingers, which resolved after surgery, and that the numbness and tingling claimant experiences post-surgery is apparently unrelated to the wrist injury as it is located in the middle, ring and small fingers as well as the dorsal and radial aspects of the right wrist. (Id.) Dr. Westpheling does not recommend any permanent work restrictions. (Id.)

On August 23, 2016, Barbra Laughlin, M.A., of Laughlin Management, issued an Employability Assessment. (Ex. 6, p. 1) She met with claimant on one occasion and did not assist him with any employment search or job placement. (Tr. p. 106) He was employed at Homeland Energy at the time of he saw Ms. Laughlin. (Tr. pp. 64-65) Ms. Laughlin concluded that based on the opinions of Dr. Westpheling and Dr. Broghammer that work restrictions are not needed claimant would have no occupational loss. (Ex. 6, p. 9) However, relying on the restrictions assigned by Dr. Matthew relating to the right wrist alone, claimant would have a 100 percent loss of directly and closely transferable occupations and a 99.6 percent loss of generally transferable occupations. (Ex. 6, p. 9) When using the restrictions assigned by Dr. Matthew for both the right wrist and the knees, she concludes that claimant has a 100 percent loss of directly, closely and generally transferable occupations. (Ex. 6, pp. 9-10) She concludes that impediments to a return to work in addition to restrictions are a lack of competitive computer skills and potential future surgery on his knees. Ms. Laughlin stated that claimant has an occupational loss that is "extremely high" at or near 100 percent. (Ex. 6, p. 10)

On September 20, 2016, Jeff Johnson, M.S. of Rehabilitation Management Services, LLC, issued a Vocational Evaluation report at the request of defendant, Second Injury Fund. (Ex. F, p. 1) Mr. Johnson based his report on review of records and did not interview the claimant. (Id.) Mr. Johnson concludes, accepting that claimant has no restrictions for his wrist injury, as recommended by Dr. Hayden, Dr. Broghammer, and Dr. Westpheling, and assuming no restrictions for the knees, claimant "remains capable of performing the full range of work" in his work history. (Ex. F, p. 6) However, considering the restrictions identified by Dr. Matthew, claimant "would not be able to perform the position of Maintenance Mechanic he has performed to date," which is his current job at Homeland Energy. (Id.) These restrictions would place claimant in the "[l]ight exertion level and driving occupations requiring lifting no greater than 20 pounds, generally classified by the DOT at the Medium exertion level." (Id.) Mr. Johnson provides a list of job titles (not currently available jobs in claimant's geographic area) that he believes claimant could perform with Dr. Matthew's restrictions. (Ex. F, p. 7) Mr. Johnson notes that claimant obtained three different jobs

with three different employers after his termination from L & R Manufacturing. (Ex. F, p. 8)

On October 17, 2016, Ms. Laughlin issued an additional vocational report after reviewing the report of Jeff Johnson. (Ex. 7, p. 1) Ms. Laughlin indicated that Mr. Johnson's report was in error concerning the conclusion that a 20 pound lifting restriction would place claimant in the medium work category. She stated that a "[l]ifting limited to 20 pounds is not thought to be at the medium exertional level, but at the light exertional level." (Ex. 7, p. 1) Ms. Laughlin is then critical of Mr. Johnson's selection of occupational titles that he believes the claimant can perform. (Ex. 7, p. 2) Ms. Laughlin conducted a search for jobs within the occupational titles identified by Mr. Johnson, in the northeast Iowa region. She found that the vast majority of occupation titles did not yield actual job openings, or the few job openings required physical exertion that exceeded the restrictions placed on claimant by Dr. Matthew. She did find one job that was open at the time of her search for a dump truck driver that appeared to be compliant with the restrictions. Ms. Laughlin was further critical of Mr. Johnson's alleged failure to properly assess transferable skills and that the occupational titles he listed did not consider the wrist injury restrictions assigned by Dr. Matthew and that the medium exertion level occupations would require accommodation. (Ex. 7, p. 8)

I find that the report of Ms. Laughlin in not consistent with the reality that followed claimant's work injury. Ms. Laughlin has opined that claimant's loss of access to the labor market is "extremely high" yet claimant was offered seven different jobs and accepted three of them after his separation from employment at L & R Manufacturing. Further, although claimant testified that he had some difficulties with his wrist or knees with the jobs he chose to accept, there was no evidence that he was unable to perform any of the jobs, or that he required any formal accommodations. Claimant testified that he left his job at Karnik Farms for a job at Wiltgen Manufacturing because it offered "[l]ess hours and [better] benefits." (Tr. p. 62) The evidence indicates that he left his job at Wiltgen Manufacturing for his present job at Homeland Energy for the purpose of obtaining better compensation, specifically including health insurance benefits. Claimant did not have health insurance at Karnik or at Wiltgen Manufacturing. (Tr. p. 63) In other words, claimant did not leave these jobs because he was unable to perform them due to his wrist or knee condition. I give Ms. Laughlin's report little weight in light of the entirety of the evidence presented.

I find that claimant has a knee condition that has been present from a very young age. This condition involves the underdevelopment of his bilateral patellae and has caused pain off and on throughout his life, with increasing pain around March 2014. On April 9, 2014, it was recommended that claimant undergo bilateral total knee arthroplasty. (Ex. 3, p. 8) Claimant has not yet had either knee replaced and is concerned that the condition of his knee caps presents a potential complicating factor for the surgery and that the surgery may not resolve his knee pain.

I find that Dr. Hayden, Dr. Broghammer and Dr. Westpheling were not asked to address the question of whether claimant had a permanent impairment to his right knee and whether or not any permanent restrictions were appropriate. Only Dr. Matthew was asked to render an opinion concerning whether claimant had permanent impairment related to his knee condition. On July 27, 2016, Dr. Matthew found that claimant had: "(1) [s]evere bilateral knee degenerative joint disease, osteoarthritis; (2) [c]hronic bilateral knee pain; (3) [b]ilateral knee weakness; (4) [d]egenerative changes in lateral compartments of the knees, as well as spurring; and, (5) [s]ignificant degenerative changes of patellofemoral joints of the knees with lateral tracking of the patellae." (Ex. 1, second page 4) He then assigned a 20 percent whole person impairment for the bilateral knees, based on the AMA Guides, and also assigned restrictions of lifting no more than 20 pounds, no prolonged standing, walking, bending, squatting, repetitive stairs or use of ladders. (Id.) Dr. Matthew makes no distinction in his diagnoses between the left and right knee. Neither does he confine the impairment rating or any stated restriction to the right or left knee alone, rather they apply equally to both knees. Further the prior recommendation for total knee replacement as stated above was applicable to both knees. Therefore, it is reasonable for the undersigned to conclude that the impairment given to the bilateral knees applies in equal portions to the left and right knee individually.

Based on the opinion of Dr. Matthew I find that claimant has a permanent impairment to his right knee of 10 percent to the whole person, based on his congenital knee condition.

I find that claimant has demonstrated his ability to obtain and maintain employment in the labor market after his July 1, 2014 work injury. He was returned to work without restriction by the treating surgeon and then terminated from his long held position at L & R Manufacturing. However, he obtained three different jobs without any formal accommodations thereafter and continued to work for Homeland Energy at the time of the hearing, earning more per hour than he did at his termination from L & R Manufacturing. (Tr. p. 61, 65) In addition to the three jobs that he accepted, claimant was offered four other positions that he declined. (Ex. H, p. 10) I find based on the facts presented that claimant is not an odd-lot worker.

Dr. Hayden assigned zero impairment and no restrictions for the wrist injury. (Ex. 3, p. 101) However, he found that claimant had 50 degrees of flexion in the right wrist and 40 degrees of extension. (Id.) Under Figure 16-28, page 467, of the AMA Guides, Fifth Edition, 50 degrees of flexion is two percent impairment of the upper extremity and 40 degrees of extension is four percent impairment of the upper extremity. It appears that Dr. Hayden's findings of limited range of motion are not reflected in his assessment of an applicable impairment rating and I therefore give little weight to his conclusion of zero permanent impairment.

Dr. Broghammer assigned four percent permanent impairment based on loss of range of motion only to the exclusion of loss of strength and loss of sensation. (Ex. B,

p. 10) Dr. Westpheling agreed with Dr. Broghammer's conclusions concerning permanency. (Ex. D, p. 3)

Dr. Matthew assigned impairment of 20 percent to the upper extremity due to loss of strength, which he converted to 12 percent of the whole person. (Ex. 1, first page 3) He also assigned 30 percent to the upper extremity due to the loss of sensation/neuropathy, which he converted to 18 percent of the whole person. (Id.) He then combined those ratings to arrive at a final impairment for the wrist injury of 30 percent to the whole person, which as stated above is incorrect, and should be 28 percent based on the combined values chart in the AMA Guides, Fifth Edition. (Id.)

I find that Dr. Broghammer has provided the most thorough assessment of impairment. He also notes that the AMA Guides conclude that loss of strength should generally not be used a basis for impairment in combination with loss of range of motion. (Ex. B, p. 11) He further notes that the AMA Guides do not place a large value on loss of strength measurements. (Id.) Dr. Broghammer is critical of Dr. Matthew's assessment of impairment due to neuropathy of 30 percent impairment, based on the medical record. I find the record indicates that the neuropathy was substantially improved following surgery, but did not entirely resolve. Nevertheless, I find that Dr. Broghammer's assessment of permanent impairment is the most persuasive and I accept the impairment for the right upper extremity assigned by Dr. Broghammer of four percent. (Ex. B, p. 10)

Concerning permanent restrictions, although Dr. Matthew assigned restrictions for the knee condition and the wrist injury, claimant testified that he violates those recommended restrictions on a daily basis in his current job at Homeland Energy. He stated that he does so because his job requires it, and he needs a job to provide for his family. It is understandable and commendable that claimant desires to provide for his family and is highly motivated to remain employed. Although it is also clear that his ability to work is greater than what is suggested by the restrictions assigned by Dr. Matthew. Claimant was hired by Dave and Donna Karnik after he was terminated by L & R Manufacturing. (Tr. p. 59) Although he had some difficulty with his wrist and knees, he left that job for better pay and better hours, not because he needed to change jobs to relieve his wrist and knee pain or because he was unable to perform the job at Karnik. (Tr. p. 62) He then worked for Wiltgen Manufacturing doing very similar work to his job at L & R Manufacturing, where he had worked for 27 years. (Tr. p. 63) Again, although he described some difficulties with his wrist and knees, the evidence supports the conclusion that he left that job to work at Homeland Energy for similar pay, with the added benefit of health insurance, not because he was unable to perform the job at Wiltgen or because he believed the job at Homeland Energy would be easier on his wrist and knees. (Tr. p. 65) In fact, claimant testified that the jobs he had after the wrist injury continued to be heavy jobs. The evidence supports the conclusion that claimant was able to perform the three jobs he had since the wrist injury without formal accommodation and without any disciplinary problems due to performance issues. Although claimant has ratable functional impairment of both his right knee and upper

extremity, I am unable to find that the restrictions assigned by Dr. Matthew are fairly representative of his ability, based on the evidence presented.

Considering claimant's age, his functional impairments to his right knee and his upper extremity, the length of healing period, his prior work experience, his continued employment post-injury, his education, his ability to engage in employment for which he is best fitted, and all other appropriate factors for the consideration of industrial disability, I find that claimant has sustained 30 percent industrial disability as a result of the combined effect of the first and second injuries.

## CONCLUSIONS OF LAW

The first issue is whether claimant has sustained a first qualifying injury.

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).

In this case, claimant sustained a first injury to his bilateral legs related to a congenital knee condition, however, claimant pleaded only the right knee as a first injury. A similar situation was evaluated by the Iowa Supreme Court in Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395 (2010). In that case the court adopted the reasoning in the prior Iowa Supreme Court case of Second Injury Fund of Iowa v. George, 737 N.W.2d 141 (Iowa 2007) in which it found that a second injury to an extremity, that also involved a bilateral injury, can nevertheless be a proper second qualifying injury, and stated that "it would be senselessly inconsistent to conclude a first qualifying injury cannot likewise occur simultaneously with an injury to another such member." Gregory v. Second Injury Fund, 777 N.W.2d at 400.

I have found above that claimant sustained permanent impairment to his right leg due to a congenital knee condition prior to the July 1, 2014 right arm injury. The fact that the first injury also involves the bilateral legs does not preclude the right leg from being a properly qualifying first injury for purposes of Second Injury Fund.

The second issue is whether or not the odd-lot doctrine is applicable to claimant in this case.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

I have found above based on the facts presented and for the reasons there stated that claimant has not proven that the odd-lot worker doctrine should apply in this case.

The third issue in this case is the extent of industrial disability.

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).

As stated above and for the reasons there given, I have determined that claimant has sustained 30 percent industrial disability.

The fourth issue in this case is the extent of credit applicable to the Second Injury Fund.

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).

Interest accrues on unpaid Second Injury Fund benefits from the date of the decision. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990).

The Second Injury Fund should be entitled to a credit for only the injuries pled Vaughn v. Maytag Corp., File No. 1245365 (App. March 13, 2003). "To do otherwise would provide the Fund with a credit for loss of use of a scheduled member which plays no role in the combined disability between the two qualifying injuries." Pace v. State Steel Supply Company, File No. 5025917 (App. November 9, 2010).

I have found above that concerning the first injury to claimant's right knee, he has sustained a ten percent whole person impairment, or 50 weeks. Claimant notes in his brief that this converts to 25 percent impairment to the lower extremity or 55 weeks and that the Second Injury Fund should receive the benefit of the higher number of weeks. (Cl. Brief, p. 20) I agree and conclude that the Second Injury Fund shall receive a credit of 55 weeks for the first injury. Concerning the second injury, I have found that claimant has sustained a four percent impairment to the right upper extremity, which is ten weeks. I therefore conclude that the Second Injury Fund is entitled to a total credit of 65 weeks.

Having found that claimant is entitled to industrial disability benefits of 30 percent, which is 150 weeks, this amount less the credit of 65 weeks leaves a balance of 85 weeks. Therefore, I find that Second Injury Fund is obligated to pay claimant 85 weeks of industrial disability benefits.

Costs are to be assessed at the discretion of the workers' compensation commissioner hearing the case. 876 IAC 4.33.

The Iowa Supreme Court has provided some guidance on the taxation of costs. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). In Young, the Court stated that 4.33 allows only for the taxation of costs "incurred in the hearing." When a physician's report is used as evidence in a hearing in lieu of the doctor's testimony, the report becomes a cost incurred in a hearing. However, because the report is separate from the examination, the underlying medical expenses associated with the examination do not become costs of a report. According to the Supreme Court, Rule 876-4.33 is designed, to allow for taxation of costs incurred in the hearing itself rather than reimbursement of fees and expenses incurred in an examination.

Here, claimant is seeking reimbursement for a vocational evaluation performed by Ms. Laughlin. This agency has held that vocational experts fall within rule 4.33. However, under Young the allowable taxable costs are the reports themselves, not the underlying examination of records or interviewing of the claimant. See LaGrange v. Nash Finch Company, File No. 5043316 (Appeal July 1, 2015). Ms. Laughlin's report is itemized at Exhibit 11, unnumbered page 6, which indicates that 4.5 hours applies to the preparation of the report. Ms. Laughlin's hourly billing rate is $110.00 per hour (4.5 hours x $110.00 per hour = $495.00). Thus, I assess costs against the Second Injury Fund for the vocational report of Ms. Laughlin in the amount of four hundred ninety-five and 00/100 dollars ($495.00).

The reimbursement sought by claimant for a letter from Dr. Matthew in the sum of $350.30, is itemized and indicates that $125.00 relates to the preparation of the letter. Under the same reasoning as stated above, I assess costs against the Second Injury Fund for the letter/report of Dr. Matthew in the amount of one hundred twenty five and 00/100 dollars ($125.00)

The remaining costs shall include the filing fee of one hundred and 00/100 dollars ($100.00)

The remaining items sought to be taxed as costs by claimant do not appear to fall within Iowa Administrative Code 876 – 4.33.

For the reason set forth above I conclude defendant, Second Injury Fund, shall reimburse claimant costs in the amount of seven hundred twenty and 00/100 dollars ($720.00).

## ORDER

IT IS THEREFORE ORDERED:

Defendant shall pay claimant eighty-five (85) weeks of industrial disability benefits beginning on the stipulated commencement date of August 12, 2015, until all benefits are paid in full.

Defendant shall be entitled to credit for all weekly benefits paid to date.

All weekly benefits shall be paid at the stipulated rate of five hundred fifty-six and 79/100 dollars ($556.79) per week.

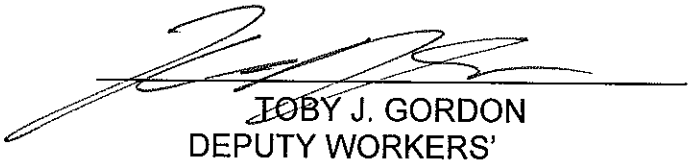
All accrued benefits shall be paid in a lump sum.

Defendant shall pay interest on any accrued weekly benefits from the date of the decision pursuant to Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990).

Defendant 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.

Defendant shall pay costs as set forth above.

Signed and filed this 20th day of April, 2017.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

David A. O'Brien
Attorney at Law
1500 Center St. NE
Cedar Rapids, IA 52402
dave@daveobrienlaw.com

Jonathan Bergman
Assistant Attorney General
Special Litigation
Hoover State Office Bldg.
Des Moines, IA 50319-0106
jonathan.bergman@iowa.gov

TJG/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.