

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SERGIO MARTINEZ,

Claimant,

vs.

NET EAGLE FINISHES, LLC,

Employer,

and

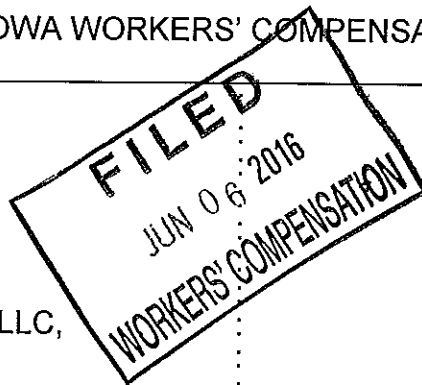
THE CINCINNATI INSURANCE
COMPANIES,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.



File No. 5047890

ARBITRATION
DECISION

Head Note Nos.: 1803, 3202

STATEMENT OF THE CASE

Sergio Martinez, claimant, filed a petition in arbitration seeking workers' compensation benefits from Net Eagle Finishes, LLC, its insurer, The Cincinnati Insurance Companies (defendants) and the Second Injury Fund of Iowa (Fund), as a result of an injury he sustained on March 13, 2013 that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa, and fully submitted on June 6, 2016. The evidence in this case consists of the testimony of claimant and Joint Exhibits 1 through 8.

ISSUES

1. The extent of claimant's permanent disability.
2. Whether claimant is entitled to benefits from the Fund; and if so,
3. The extent of credit the Fund is entitled to for the first qualifying injury.
4. Assessment of costs.

STIPULATIONS

The stipulations contained in the Hearing Report are accepted. The stipulation includes claimant had an injury to his left upper extremity (arm) on March 13, 2013 that caused temporary and permanent disability and that the commencement date for permanent disability benefits is October 24, 2013. The stipulated weekly rate of \$611.90 is accepted. The defendants are entitled to a credit of 12.5 weeks of permanent partial disability paid at \$611.90.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Sergio Martinez, claimant, was 40 years old at the time of the hearing. He went through the 10th grade and dropped out of school to go to work. (Exhibit 7, page 7) He has no additional education. Claimant is left-hand dominant. His primary language is Spanish. He is able to speak English well and did not need a translator at the hearing. However, at times claimant had a little trouble understanding questions at the hearing and would ask for clarification. Since leaving school claimant has had three types of jobs. He has been a framer for residential and commercial buildings, installed highway guard rails and has installed sheet rock. Claimant started a business three months ago which offers framing and sheet rock. Claimant sub-contracts out the physical labor. He projected that he would have gross earnings of about \$60,000.00 per year.

Claimant worked for Net Eagle Finishes¹, LLC hanging drywall. It was a union job. Claimant was a working foreman. He would assign work, but did not hire or fire employees. He would perform physical labor along with the employees. His job ended at Net Eagle Finishes due to a business closing, not as a result of his injury. (Ex. 7, p. 20) He worked for two other companies after working for Net Eagle Finishes doing commercial framing and drywall; Allied Construction and PCI. Both of those jobs were union jobs, and he earned more per hour than when he worked for Net Eagle Finishes. Claimant did not know and did not tell these employers he had restrictions. Claimant had a helper at work that would help him lift drywall.

On March 13, 2013 claimant picked up a full sheet of drywall and experienced pain from his index finger to his elbow. Claimant was seen at Iowa Methodist Occupational Health on March 14, 2013. At that time he was provided a splint. (Ex. 1, p. 1) On March 25, 2013 claimant returned to Iowa Methodist Occupational Health and was diagnosed with, "03/12/2013 [sic] onset of left wrist pain with dysesthesias of the 4th and 5th digits of left hand." (Ex. 1, p. 2)

¹ Net Eagle Finishes, LLC is also referred to in the record as Redstone.

On May 20, 2013 Jeffrey Rodgers, M.D. examined claimant. His assessment was, "Left cubital tunnel syndrome, fairly short duration of symptoms." (Ex. 2, p. 3) On June 17, 2013 claimant returned to Dr. Rodgers. At that appointment claimant complained of left wrist pain. Dr. Rodgers used a translator to obtain claimant's history. (Ex. 2, p. 4) Dr. Rodgers ordered an MRI. On July 7, 2013 Dr. Rodgers' assessment was,

1. Ulnar neuropathy previously documented on EMGs, nerve conduction studies with abnormalities only at the elbow
2. Left wrist pisotriquetral ganglion with underlying pisotriquetral arthritis

Dorsal wrist pain not explained by his MRI findings or EMG findings or clinical exam findings

(Ex. 2, p.6) On August 2, 2013 Dr. Rodgers recommended surgery. (Ex. 2, p.8) On August 20, 2013 Dr. Rodgers performed surgery. His postoperative diagnosis was,

1. Left cubital tunnel syndrome with ulnar nerve instability.
2. Left ulnar wrist ganglion.

(Ex. 3, p. 1)

On October 23, 2013 claimant reported intermittent numbness, worse than his preoperative condition. (Ex. 2, p. 14) On that date Dr. Rodgers released claimant to return to work with no restrictions. (Ex. 2, p. 15) On March 5, 2014 claimant told Dr. Rodgers he was still experiencing some radiating ulnar forearm dysesthesias and pain. He also developed anterior elbow pain over the past 1 ½ months. (Ex. 2, p. 16) He found the claimant to be at maximum medical improvement (MMI) on March 5, 2014. On April 11, 2014 Dr. Rodgers stated the claimant had a 4 percent impairment to the left upper extremity. He also agreed with the restriction of the functional capacity evaluation (FCE) done on March 11, 2014. (Ex. 2, pp. 19, 20) Dr. Rodgers was the last physician claimant has seen for treatment of his left upper extremity.

The FCE of March 11, 2014 was deemed valid. The FCE recommended restrictions for lifting with claimant's left upper extremity of 25 pounds floor to waist, 10 pounds waist to shoulder and 10 pounds overhead. (Ex. 5, p. 6)

On April 17, 2014 Sunil Bansal, M.D. performed an independent medical examination (IME). Dr. Bansal's diagnosis of claimant's March 13, 2013 injury was,

- Left cubital tunnel syndrome.
- Left wrist pisotriquetral ganglion.

Status post anterior intramuscular ulnar nerve transposition of the left elbow, with flexor pronator Z-lengthening, excision of ganglion emanating from the pisotriquetral joint.

(Ex. 8, p. 10) Dr. Bansal provided an 11 percent left upper extremity rating. (Ex. 8, p. 11) He provided a 2 percent impairment rating for the claimant's left knee injury. (Ex. 8, p. 11) He recommended no lifting greater than 10 pounds occasionally and no frequent lifting of over 5 pounds with the left arm. (Ex. 8, p. 11)

Claimant had a nail gun injury to his left knee in 2003. He had surgery. This was performed by Samuel Tabet, M.D. on November 21, 2013. (Ex. 6, pp. 4, 5) On March 9, 2014 Dr. Tabet performed a rating on the claimant's knee. Dr. Tabet gave claimant a 12 percent whole body and 30 percent lower extremity rating for this injury. While the report does not list which source Dr. Tabet uses for his rating he refers to Table 17-8 for his source. The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition has a table 17-8 which corresponds to the rating Dr. Tabet provided. I find that the rating Dr. Tabet gave was based upon the AMA Guides Fifth Edition.

Claimant has not had medical treatment for his knee since 2004. Claimant testified that his knee injury causes him to miss work. At the hearing he said that he missed a day or so a week. He appeared confused about what was asked, which could have been a language issue. It seems doubtful that he could miss that much work and still be employed in construction. He did not report missing that much work due to his knee in his deposition.

I find that claimant has a qualifying first injury. He had knee surgery and was given a permanent rating by Dr. Tabet. He has some loss of strength in his left leg and pain. I find that the Fund is entitled to a credit of 66 weeks for this injury (220 weeks x 30% = 66). The parties have stipulated claimant has a second qualifying injury for Fund liability purposes.

Claimant testified that he does not do as much physical work now that he has started his own business. He uses two hands to screw in the drywall. He said that he no longer pushes a lawn mower or shovels snow due to his left arm injury. Claimant testified that he can lift on his own 30 pounds. (Ex. 7, p. 36)

Claimant has worked above the restrictions recommended by Dr. Bansal, lifting up to 30 pounds. I find that the FCE of March 11, 2014 restrictions are claimant's restrictions.

Claimant has been involved in construction manual work all his life. He has a limited education. His English skills do not present any barrier to employment. He has the ability to supervise other workers and for at least three months has run his own business. Claimant predicted he would earn about \$60,000.00 this year. It was not clear whether that was gross or net. His earnings are without benefits that he would have had as a union drywall installer.

Considering all of the above factors I find that claimant has a 35 percent loss in earning capacity.

CONCLUSIONS OF LAW

The parties stipulated claimant has a permanent injury injured his left upper extremity that arose out of and in the course of his employment with Net Eagle Finishes, LLC.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

In this case we have two different impairment ratings for the claimant's left upper extremity. Dr. Rodgers provided a 4 percent and Dr. Bansal provided an 11 percent rating. In choosing between the two ratings I find that Dr. Bansal's rating is more accurate. Dr. Bansal based his rating on testing he did to calculate a rating. Dr. Rodgers based his rating on the last exam he performed, which was not for the purpose of a rating.

I find that defendants Net Eagle Finishes, LLC and The Cincinnati Insurance Company shall pay claimant 27.5 weeks of permanent partial disability benefits (250 weeks x .11 % = 27.5).

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).

As I found claimant has both a first and second qualifying injury for Fund liability purposes, his disability is analyzed as an industrial disability.

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).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

I found that claimant had a 35 percent loss of earning capacity. Claimant has been in construction all of his life. He has limited education. He is motivated to work and has figured out ways to keep working with his lifting limitations. He has limited use of grip strength in his dominant hand. For a construction worker he has very significant lifting limitations. I find that the claimant has a 35 percent industrial disability entitling claimant to 175 weeks of permanent partial benefits.

The Fund is entitled to a credit of 93.5 weeks ($66 + 27.5 = 93.5$ | $175 - 93.5 = 81.5$). The Fund will be responsible to pay claimant 81.5 weeks of permanent partial disability benefits. 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).

Claimant has requested costs of the filing fee of \$100.00. Using my discretion under 876 IAC 4.33 I award this cost to claimant.

ORDER

Defendants Net Eagle Finishes, LLC and The Cincinnati Insurance Companies shall pay claimant twenty seven point five (27.5) weeks of permanent partial disability benefits at the weekly rate of six hundred eleven and 90/100 dollars (\$611.90) with benefits commencing on October 24, 2013.

Defendants Net Eagle Finishes, LLC and The Cincinnati Insurance Companies shall pay claimant one hundred dollars (\$100.00) in costs.


Defendants Net Eagle Finishes, LLC and The Cincinnati Insurance Companies shall have credit for twelve point five (12.5) weeks of permanent partial disability benefits at the weekly rate of six hundred eleven and 90/100 dollars (\$611.90).

Defendants Net Eagle Finishes, LLC and The Cincinnati Insurance Companies shall file subsequent report of injuries (SROI) as required by this agency.

The Second injury Fund of Iowa shall pay claimant eighty one point five (81.5) weeks of permanent partial disability benefits at the weekly rate of six hundred eleven and 90/100 dollars (\$611.90). Commencement date for payment by the Second Injury Fund of Iowa shall be the week twenty-eight (28) weeks after October 24, 2013.

Defendants Net Eagle Finishes, LLC and Cincinnati Insurance Companies and the Second injury Fund of Iowa shall pay any past due amounts in a lump sum with interest as provided by law.

Signed and filed this 6th day of June, 2016.


JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/sam

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.