BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ESTATE OF WILLIAM B. FARWELL,

Claimant,

vs.

CITY OF DES MOINES,

Employer,

and

EMC RISK SERVICES, L.L.C.,

Insurance Carrier

and

SECOND INJURY FUND OF IOWA,

Defendants.

File Nos. 5060506, 5060507

ARBITRATION

DECISION

Head Notes: 1402.40, 1803, 1803.1, 2209, 2907, 3202

STATEMENT OF THE CASE

The Estate of William B. Farwell, claimant, filed two petitions for arbitration against The City of Des Moines, as the employer, and EMC Risk Services, L.L.C., as the insurance carrier. File No. 5060507 involves a claim for bilateral carpal tunnel syndrome with an injury date of April 3, 2014. File No. 5060506 involves a claim for a left shoulder and right knee injury. Claimant's original notice and petition alleges a cumulative injury date for both injuries of October 6, 2015. However, at hearing claimant alleged separate cumulative injury dates, including October 6, 2015 for the alleged right knee condition and November 17, 2015 for the alleged left shoulder injury.

Claimant also filed a claim against the Second Injury Fund of Iowa in File No. 5060506. The Second Injury Fund objected to modification of the original notice and petition to include separate cumulative injury dates at the time of hearing. That objection was taken under advisement and is now overruled. This contested case proceeded to an in-person hearing in Des Moines on May 17, 2019.

The parties filed hearing reports in each file at the commencement of the hearing. On the hearing reports, the parties entered into numerous stipulations. Those

stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 and 2, Claimant's Exhibits 1 through 10, and Second Injury Fund Exhibits AA through JJ. The employer did not file a separate set of exhibits.

Claimant called Mr. Farwell's daughter, Amanda Farwell, to testify. No other witnesses testified live. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The parties filed post-hearing briefs simultaneously on June 26, 2019. This case was considered fully submitted to the undersigned on that date.

ISSUES

In File No. 5060507, the parties submitted the following disputed issues for resolution:

1. Whether the bilateral carpal tunnel syndromes resulted in permanent disability and, if so, the extent of claimant's entitlement to permanent partial disability benefits.

2. Whether defendants should be ordered to reimburse claimant's independent medical evaluation expense.

In File No. 5060506, the parties submitted the following disputed issues for resolution:

1. Whether claimant suffered separate and distinct cumulative injuries resulting in a cumulative injury to the right knee on October 6, 205 and a cumulative injury to the left shoulder on November 17, 2015.

2. The proper cumulative injury dates for Mr. Farwell's right knee and left shoulder injuries.

3. Whether the alleged injuries caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability, or healing period, benefits.

4. Whether the left shoulder injury resulted in permanent disability.

5. Whether the right knee and left shoulder injuries should be compensated separately or as a combined disability, if both resulted in permanent disability.

6. The extent of claimant's entitlement to permanent disability benefits.

7. The proper commencement date or dates for permanent disability benefits.

8. Whether claimant has proven a first qualifying injury for purposes of Second Injury Fund benefits.

9. Whether claimant has proven a second qualifying injury for purposes of Second Injury Fund benefits.

10. The extent of the Second Injury Fund liability, if any, including any claims for credits due to benefits paid or payable by the employer.

11. Whether defendants should be ordered to reimburse claimant's independent medical evaluation expense.

FINDINGS OF FACT

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

William Farwell worked for the City of Des Moines as a Fleet Services Mechanic Team Leader. In that position, he performed heavy mechanic work on City vehicles and equipment. Mr. Farwell commenced working for the City of Des Moines in 1981. (Claimant's Exhibit 9, page 30) His position was later contracted out by the City, but claimant continued to work at the same physical address working on City vehicles and equipment. (Claimant's Ex. 9, p. 30) However, Mr. Farwell returned to employment with the City of Des Moines in August 2001 and continued working for the City until his retirement in January 2016. (Tr., pp. 27-28; Claimant's Ex. 8, p. 27; Claimant's Ex. 9, pp. 29-30; Claimant's Ex. 10, p. 33)

Mr. Farwell passed away unexpectedly of a heart condition on August 7, 2016. (Tr., p. 29) Mr. Farwell's death was not related to any of the injuries he sustained with the City of Des Moines. (Tr., p. 29) Mr. Farwell's estate brings this claim for benefits.

As a result of his mechanic work duties with the City of Des Moines, Mr. Farwell sustained bilateral carpal tunnel syndrome, which manifested on April 3, 2014. Mr. Farwell submitted to two separate carpal tunnel releases and had a relatively uneventful recovery from those surgical procedures.

Michael A. Gainer, M.D. is the orthopaedic surgeon who treated claimant's bilateral carpal tunnel syndrome. Dr. Gainer performed a left carpal tunnel release on August 6, 2014. On September 25, 2014, Dr. Gainer noted that claimant had "no complaints," noted that claimant had normal strength in his left wrist, as well as active pain free range of motion. Dr. Gainer declared maximum medical improvement for the left wrist as of September 25, 2014 and released Mr. Farwell to return to full duty work without restrictions. (Joint Ex. 2, pp. 10-11)

Dr. Gainer took Mr. Farwell back for surgery and performed a right carpal tunnel release on October 8, 2014. Again, on December 23, 2014, Dr. Gainer noted that Mr. Farwell had "no complaints" related to his right carpal tunnel syndrome and surgery. (Joint Ex. 2, p. 12) Dr. Gainer released Mr. Farwell to return to work without restrictions and declared maximum medical improvement as of December 23, 2014. (Joint Ex. 2, pp. 13-14) Dr. Gainer opined that Mr. Farwell had no permanent impairment related to his right or left carpal tunnel syndromes and surgical interventions. (Joint Ex. 2, pp. 14, 31)

Claimant obtained an independent medical evaluation via a record review performed by Sunil Bansal, M.D. (Claimant's Ex. 1) Dr. Bansal did not review this case until after Mr. Farwell's death. Therefore, he was not able to physically evaluate Mr. Farwell or conduct any interview of Mr. Farwell.

Dr. Bansal reviewed the medical records of Mercy West Family Practice and Urgent Care, those of Dr. Gainer, those of Richard Bratkiewicz, M.D. with Methodist Occupational Health and Wellness, as well as operative notes from Dr. Gainer and diagnostic imaging performed on claimant's right knee and left shoulder (relevant to those claims discussed below). Dr. Bansal also appears to have had claimant's job description available for consideration.

Dr. Bansal opines that Mr. Farwell sustained two percent permanent impairment of each upper extremity as a result of his carpal tunnel syndrome. Dr. Bansal provides no reference to the AMA Guides to justify his impairment rating. He offers no explanation why his opinion differs from that offered by Dr. Gainer.

The Second Injury Fund also secured an expert medical opinion via record review performed by Dean K. Wampler, M.D. Dr. Wampler specifically reviewed claimant's case and medical records to comment upon the impairment rating offered by Dr. Bansal. Dr. Wampler provides a fairly detailed explanation of the requirements set forth in the AMA Guides, Fifth Edition, to qualify for a permanent impairment rating as a result of a carpal tunnel syndrome diagnosis.

Dr. Wampler ultimately critiques and explains why Dr. Bansal's carpal tunnel ratings are not consistent with the AMA Guides. Instead, Dr. Wampler concurs with Dr. Gainer that claimant had a zero percent permanent impairment for his bilateral carpal tunnel syndromes and related surgical procedures.

Considering that Dr. Gainer had the ability to physically evaluate claimant, that he performed surgery on claimant, and evaluated him several times pre-operatively and post-operatively, I find Dr. Gainer's opinion to be most informed and credible. Dr. Bansal was clearly limited in that he could not evaluate or interview claimant. His impairment rating is cursory and conclusory without any reference to the AMA Guides or how Mr. Farwell qualified for an impairment rating. I find Dr. Wampler's critique of Dr. Bansal to be informative, consistent with the AMA Guides, and credible. Therefore, I

find that claimant has not proven any permanent impairment or loss of function as a result of the bilateral carpal tunnel conditions for the April 3, 2014 injury date.

Claimant also asserts that Mr. Farwell sustained separate injuries to his left shoulder and right knee. Claimant initially pled these injuries as cumulative injuries with the same manifestation date. At trial, claimant attempted to separate these injuries and assert separate injury dates for the left shoulder and right knee injuries.

Mr. Farwell initially sought treatment for the left shoulder and right knee on October 6, 2015. That medical record from Dr. Bratkiewicz indicates Mr. Farwell complained of left shoulder symptoms "he relates to the fact that he is overusing this to protect his surgically corrected right shoulder for a rotator cuff tear which was done in early 2000." Dr. Bratkiewicz recorded that Mr. Farwell was unable to lift his left arm above his head and that the symptoms had been ongoing for several months. Dr. Bratkiewicz also noted that claimant had "gotten to the point where he does not feel he can do the full duties of his job with his shoulder." (Joint Ex. 1, p. 5)

I find that claimant knew or shoulder have known by October 6, 2015 that his left shoulder was injured and that the shoulder was related to his work activities at the City of Des Moines. By that date, Mr. Farwell knew he was overcompensating for a prior work-related right shoulder injury, that his left shoulder was painful, that he could not lift his left arm overhead, that the symptoms had persisted for several months, and that he was no longer able to perform his full duty work tasks with the left shoulder. Dr. Bratkiewicz diagnosed the left shoulder condition as an overuse injury that was work related, recommended an MRI of the left shoulder, noted his suspicion of a rotator cuff tear, and imposed work restrictions for the left shoulder. (Joint Ex. 1, p. 5) By this date, Mr. Farwell knew or should have known that his left shoulder condition was serious. Therefore, I find that the left shoulder cumulative injury manifested on October 6, 2015.

On October 6, 2015, Mr. Farwell also sought treatment for his right knee with Dr. Bratkiewicz. That same medical note records that Mr. Farwell had right knee symptoms and that he "feels that prolonged standing at work is aggravating this." (Joint Ex. 1, p. 5) Mr. Farwell reported a deep pain sensation in the knee, a feeling that the knee was unstable, and that the knee gave out from time to time. Once again, Mr. Farwell reported that his knee symptoms had been occurring for several months. Dr. Bratkiewicz diagnosed the right knee condition as an overuse injury that was work related at the October 6, 2015 examination. (Joint Ex. 1, p. 5)

Dr. Bratkiewicz recommended an MRI of the right knee at his October 6, 2015 evaluation. He expressed concern that there was a medial meniscus tear in claimant's right knee, and placed claimant on work restrictions for the right knee. (Joint Ex. 1, p. 5) I find that Mr. Farwell knew or should have known by October 6, 2015 that he had sustained a right knee injury and that the right knee injury was related to work. I find that Mr. Farwell knew or should have known the probable compensable character of the right knee injury, as well as the seriousness of the injury. By this date, claimant was aware of several months of pain, knew he needed an MRI, knew that the physician

suspected a torn meniscus, and that the injury was a work-related injury that required work restrictions. Therefore, I find that Mr. Farwell's right knee injury manifested on October 6, 2015.

With respect to the right knee condition, Mr. Farwell ultimately sought treatment via referral, from an orthopaedic surgeon, Stephen A. Ash, M.D. Dr. Ash first evaluated Mr. Farwell on December 1, 2015. Dr. Ash diagnosed claimant with an exacerbation of his right knee degenerative joint disease and a possible meniscal tear. With respect to the left shoulder, Dr. Ash diagnosed a probable left rotator cuff tear as well as degenerative joint disease of the left shoulder. He recommended CT scans of both the left shoulder and right knee and imposed work restrictions. (Joint Ex. 2, p. 23)

Dr. Ash re-evaluated Mr. Farwell on January 15, 2016, noting ongoing left shoulder symptoms and noting return of right knee symptoms after an injection into the right knee. At that evaluation, Dr. Ash recommended surgical intervention for the right knee. (Joint Ex. 2, pp. 24-25) Dr. Ash took claimant to surgery on March 23, 2016 and performed a partial medial meniscectomy on Farwell's right knee. (Joint Ex. 2, p. 28)

On April 18, 2016, Dr. Ash noted that Farwell's surgical right knee wounds were well healed and that his right knee was much better than prior to surgery. As of that date, Dr. Ash released Mr. Farwell to return to work without restriction for his right knee. Dr. Ash declared maximum medical improvement for the right knee as of April 18, 2016. (Joint Ex. 2, p. 32) Dr. Ash opined that Mr. Farwell sustained a two percent permanent impairment of the right lower extremity as a result of his right knee injury, which he also converted to an impairment equal to one percent of the whole person. (Claimant's Ex. 5, p. 18) Dr. Ash's impairment rating references a specific table of the AMA Guides and appears to be consistent with that table. (Claimant's Ex. 5, p. 18)

Dr. Bansal opined, "Mr. Farwell has a meniscal tear that has not been operated on, as well as moderate knee arthritis. He is assigned a 9% lower extremity impairment, or a 3% whole person impairment." (Claimant's Ex. 1, p. 9) Quite clearly, Mr. Farwell did submit to surgical intervention of the right knee. Dr. Bansal clearly did not have all the relevant medical records to render his opinion.

Dr. Ash offers his opinion from a much superior position having conducted the surgical procedure that Dr. Bansal was not even aware occurred. Dr. Ash's impairment rating references a specific table in the AMA Guides. I find the impairment by Dr. Ash to be most consistent with the AMA Guides and most credible under the circumstances. Therefore, I find that claimant has proven a two percent permanent impairment of the right knee, which converts to one percent of the whole person.

Although Dr. Ash diagnosed a left rotator cuff tear and ongoing symptoms, no additional treatment was rendered for the left shoulder between January 15, 2016 and Mr. Farwell's death in August 2016. Although it is possible that additional treatment could have been performed and potentially could have improved claimant's condition, no additional treatment was recommended or undertaken by Dr. Ash. Therefore, I

conclude that Mr. Farwell's left shoulder condition was at maximum medical improvement and that it is appropriate to consider permanent disability related to that injury.

Dr. Bansal offers the only opinion on permanent impairment related to the left shoulder. He opines that claimant sustained a six percent permanent impairment of the whole person as a result his left shoulder injury. Dr. Ash's medical notes demonstrate an ongoing diagnosis of left rotator cuff tear and ongoing symptoms. Therefore, I find the unrebutted opinion of Dr. Bansal to be accurate and find that claimant has proven a six percent permanent impairment of the whole person as a result of his left shoulder injury.

Having found that Mr. Farwell achieved maximum medical improvement for both the left shoulder and right knee, I must also consider his claim for permanent disability and the proper commencement date for permanent disability. I find that Mr. Farwell achieved maximum medical improvement for both the left shoulder and right knee on or before April 18, 2016. (Joint Ex. 2, p. 32) I find that Mr. Farwell had ongoing left shoulder restrictions as of this date and was not capable of performing substantially similar work. He was retired by this date and not working.

Mr. Farwell's right knee and left shoulder injuries manifested on October 6, 2015, Mr. Farwell was 64 years of age. He passed away in August 2016 at the age of 65.

None of his physicians recommended or imposed restrictions that required Mr. Farwell to retire. Nevertheless, it appears that Mr. Farwell had ongoing symptoms and, at least partially, elected to retire due to ongoing symptoms from his work injuries. He did not seek additional employment after his retirement in January 2016. However, he remained active and capable of caring for his grandson through the date of his death.

Mr. Farwell's daughter testified that he continued to exhibit signs of symptoms in his hands, left shoulder and right knee after his retirement. (Tr., pp. 28-34) He stopped performing car maintenance for his children after his retirement. (Tr., p. 34) Mr. Farwell exhibited a good work history and appears to have been a motivated worker, who worked for years with symptoms before seeking care. He elected to retire and remove himself from the workforce. Yet, his retirement was likely at least partially due to his injuries.

Retiring at the age of 65, it was unlikely that Mr. Farwell would be able to retrain or seek employment outside his long-time mechanic position. He had a high school diploma but no other training that would qualify him for more sedentary work. (Claimant's Ex. 8, p. 26)

Considering Mr. Farwell's age, the situs and severity of his right knee and left shoulder injuries, his permanent impairment ratings, ongoing left shoulder restrictions, his educational background, employment history, motivation, inability to retrain, and all other factors of industrial disability outlined by the Iowa Supreme Court, I find that

claimant proved Mr. Farwell sustained a 35 percent loss of future earning capacity as a result of his October 6, 2015 left shoulder and right knee injuries.

CONCLUSIONS OF LAW

In File No. 5060507, the initial dispute is whether claimant sustained permanent disability and, if so, the extent of claimant's entitlement to permanent partial disability benefits. The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Having found the medical opinions of Dr. Gainer to be most persuasive on the issue of permanent impairment relative to claimant's bilateral carpal tunnel claims, I found that claimant failed to prove permanent disability resulting from the bilateral carpal tunnel syndromes he developed with an April 3, 2014 manifestation date. Therefore, I conclude that claimant failed to prove entitlement to any permanent disability benefits in File No. 5060507.

In File No. 5060506, claimant asserted separate cumulative injury manifestation dates for his left shoulder and right knee injuries. Although the second injury fund disputed whether claimant is entitled to assert differing cumulative injury dates, I overruled that objection earlier in this decision. Therefore, I must consider the proper manifestation date for the left shoulder injury and the right knee injury.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be

plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Having found that claimant knew or should have known that he sustained a left shoulder injury as well as a right knee injury and that he knew or should have known that both were work related by October 6, 2015, I found that both the left shoulder and right knee injuries manifested by October 6, 2015. I conclude that the proper injury date for both the left shoulder and the right knee injuries should be October 6, 2015 and consider them as a single injury claim.

Claimant argued for permanent disability awards for both the right knee and left shoulder injuries. In the alternative, claimant asserted that the left shoulder injury had not reached maximum medical improvement and that claimant should receive an award of a running healing period through the date of his death. Having found that claimant had ongoing symptoms but that further treatment was not recommended or provided, I found that claimant did achieve maximum medical improvement for the left shoulder injury.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In this instance, the earliest of the relevant statutory factors is maximum medical improvement. Having found that Mr. Farwell achieved maximum medical improvement for both the left shoulder and right knee on April 18, 2016, I conclude this is the date that healing period benefits should terminate. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372-374 (Iowa 2016). Permanent partial disability benefits should commence on April 19, 2016. Iowa Code section 85.34(2).

If considered by itself, claimant's right knee injury would be compensated as a scheduled member injury pursuant to Iowa Code section 85.34(2)(0). However, the

injury also includes a left shoulder claim. When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Comm'r. Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

Since claimant's October 6, 2015 injury includes both a scheduled member injury and an unscheduled injury, the injury is compensated with industrial disability. Iowa Code section 85.34(2)(u). 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, 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.

Having considered the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant proved Mr. Farwell sustained a 35 percent loss of future earning capacity. This is equivalent to a 35 percent industrial disability and entitles claimant to an award of 175 weeks of permanent partial disability benefits. Iowa Code section 85.35(2)(u).

However, Mr. Farwell died on August 7, 2016. Mr. Farwell's death was unrelated to any of his work injuries. Therefore, pursuant to Iowa Code section 85.31(4), defendants' obligation for payment of any benefits not yet accrued as of August 7, 2016 ceases and claimant's entitlement to weekly benefits terminates as of that date.

In this case, the industrial disability benefits awarded will clearly not be paid in full prior to the date of Mr. Farwell's death. Therefore, although the award of industrial disability is made, claimant's entitlement to weekly benefits terminates as of August 7, 2016. Iowa Code section 85.31(4).

Claimant also asserts a Second Injury Fund claim in File No. 5060506. 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 355 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

Having found that claimant failed to prove Mr. Farwell sustained permanent disability as a result of the April 3, 2014 injury date, I conclude that claimant failed to demonstrate a qualifying first injury. Similarly, having found that the left shoulder and right knee manifested on the same date, claimant cannot demonstrate a qualifying second injury. Again, having found no permanent disability for the April 3, 2014 injury date, claimant also fails to demonstrate that permanent disability exists as to the initial injury. Therefore, I conclude that claimant failed to prove a compensable Second Injury Fund claim. Claimant will not be awarded any benefits from the Second Injury Fund.

Finally, claimant asserted a request for award of Dr. Bansal's charges in both files. Independent medical evaluation charges can be awarded in either of two ways. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). First, an independent medical evaluation can be awarded pursuant to Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need

not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Claimant's rights under Iowa Code section 85.39 require fulfillment of the statutory requirements. The employer is not responsible for payment of fees incurred outside the statutory process. Young, 867 N.W.2d at 844.

Iowa Code section 85.39(2) provides that, if the employer has obtained an evaluation of permanent disability from a physician of its choosing, the employer must reimburse claimant for a subsequent examination by a physician of the employee's choosing. In this instance, Dr. Bansal provided a competing impairment rating for the bilateral carpal tunnel and right knee but did not perform an examination because claimant was already deceased when Dr. Bansal was retained.

In other words, Dr. Bansal performed only a records review and rendered a written opinion. The statute specifically contemplates and requires reimbursement for an examination. Iowa Code section 85.39(2). I conclude that claimant cannot establish the necessary prerequisites of the statute to qualify for reimbursement of Dr. Bansal's charges.

The second method by which an independent medical evaluation can be, at least partially, reimbursed is through a taxation of costs. Young, 867 N.W.2d at 846. Costs are assessed at the discretion of the agency. Iowa Code section 86.40.

In this instance, I rejected Dr. Bansal's impairment ratings related to Mr. Farwell's bilateral carpal tunnel and right knee injuries. However, Dr. Bansal provided an unrebutted permanent impairment rating related to the left shoulder, which I accepted. Claimant obtained an award of permanent disability benefits based upon the left shoulder injury. While I rejected most of the aspects of Dr. Bansal's opinions, I did rely upon a portion of his opinions to render an award of benefits. Therefore, I conclude that it would be appropriate to assess a portion of Dr. Bansal's fees as costs pursuant to 876 IAC 4.33(6).

However, only that portion of Dr. Bansal's charges related to drafting his report is eligible to be assessed as a cost. Young, 867 N.W.2d at 846. The Iowa Supreme Court made it clear that only the cost of the report is taxable as a cost because that is essentially the substitute of the doctor's testimony. Review of Dr. Bansal's invoice at Claimant's Exhibit 2, page 12 demonstrates that Dr. Bansal provided no itemization as to his charges. I am not willing to speculate as to the charges pertaining to drafting of a report and specifically as to drafting of Dr. Bansal's report specific to the left shoulder. Therefore, I conclude that none of Dr. Bansal's charges should be taxed as a cost.

ORDER

THEREFORE, IT IS ORDERED:

In File No. 5060507:

Claimant takes no further weekly benefits.

All parties shall bear their own costs.

In File No. 5060506:

Defendants, employer and insurance carrier, shall pay claimant additional healing period benefits from April 15, 2016 through April 18, 2016.

Defendants, employer and insurance carrier, shall pay 150 weeks of permanent partial disability benefits commencing on April 19, 2016.

Defendants' obligation to pay weekly benefits shall terminate upon claimant's death on August 7, 2016.

All weekly benefits should be paid at the stipulated rate of seven hundred fifty-one and 84/100 dollars ($751.84) per week.

The employer and insurance carrier shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

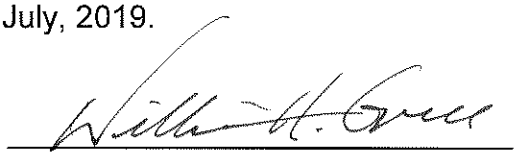
Claimant takes nothing from the Second Injury Fund of Iowa.

All parties shall pay their own costs.

In both files:

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 22nd day of July, 2019.



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Sarah.brandt@ag.iowa.gov

WHG/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.