

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GEORGE TAYLOR,

Claimant,

vs.

CAMERON MITCHELL, INC.,

Employer,

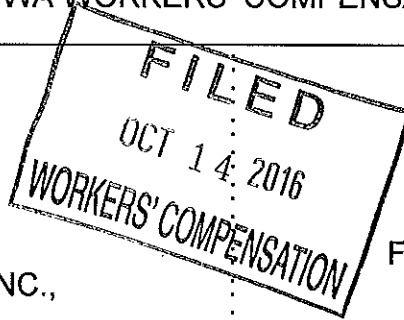
and

ACCIDENT FUND INSURANCE
COMPANY OF AMERICA,

Insurance Carrier,

SECOND INJURY FUND OF IOWA,

Defendants.



File Nos. 5049728; 5052054

ARBITRATION
DECISION

Head Note Nos.: 1803; 1700; 1803.1;
3001; 3002; 3202

STATEMENT OF THE CASE

George Taylor, claimant, filed a petitions in arbitration seeking workers' compensation benefits from Cameron Mitchell, Inc., and its insurer, Accident Fund Insurance Company of America (defendants) and the Second Injury Fund of Iowa (Fund) as a result of injuries he sustained on September 24, 2012 and February 11, 2013 that arose out of and in the course of his employment. Claimant alleges a qualifying first injury for Fund liability to his left arm in 2001. This case was heard in Des Moines, Iowa and fully submitted in March 1, 2016. The evidence in this case consists of the testimony of claimant, Jerry Mitchell, claimant's exhibits 1 through 16, and defendants' exhibits A through J. The Fund offered no additional exhibits and relies upon the admitted exhibits.

ISSUES

For File No. 5052054 (Date of injury September 24, 2012):

1. Whether the injury to the right knee and is a cause of permanent disability and, if so;
2. Whether the alleged disability is a scheduled member disability or an unscheduled disability; and if scheduled whether disability.
3. The extent of claimant's disability.

4. Whether claimant has an injury to his left knee.
5. Whether the alleged injury to the left knee and is a cause of permanent disability and, if so;
6. Whether the alleged disability is a scheduled member disability or an unscheduled disability; and if so,
7. The extent of claimant's disability.
8. Whether claimant is entitled to payment for an independent medical examination.
9. Whether claimant is entitled to alternate medical care.
10. Claimant's gross income.
11. Claimant weekly rate.
12. The amount of credit the employer and insurance carrier are emitted to for overpayment of temporal total and permanent partial disability benefits.
13. Whether claimant is entitled to benefits under the Second Injury Compensation Act; if so,
14. The extent of industrial disability,
15. The amount of credit the Fund is entitled to receive.
16. Assessment of costs.

For File No. 5049728 (Date of injury February 22, 2013):

1. Whether the injury to the right knee and is a cause of permanent disability and, if so;
2. Whether the alleged disability is a scheduled member disability or an unscheduled disability;
3. The extent of claimant's disability.
4. Whether claimant has an injury to his left knee.
5. Whether the alleged injury to the left knee is a cause of permanent disability and, if so;
6. Whether the alleged disability is a scheduled member disability or an unscheduled disability; and if so,

7. The extent of claimant's disability.
8. Whether claimant is entitled to payment for an independent medical examination.
9. Whether claimant is entitled to alternate medical care.
10. Claimant's gross income.
11. Claimant weekly rate.
12. The amount of credit the employer and insurance carrier are entitled to for overpayment of temporal total and permanent partial disability benefits.
13. Whether claimant is entitled to benefits under the Second Injury Compensation Act; if so,
14. The extent of industrial disability,
15. The amount of credit the Fund is entitled to receive.
16. Assessment of costs.

STIPULATIONS FOR FILE NOS. 5052054 AND 5049728

The parties agree that claimant had an injury to his right knee on September 24, 2014 that arose out of and in the course of his employment at Cameron Mitchell. The parties agree that claimant had both a temporary and permanent disability, although temporary benefits are not in dispute. The parties agree that the commencement date for permanent benefits against the defendants, Cameron Mitchell and Accident Fund Insurance Company of America, is November 10, 2014. I accept these stipulations.

FINDINGS OF FACT

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

George Taylor was 43 years old at the time of the hearing. He went through the 9th grade, but did not complete all his course work. He has no other formal education.

Claimant has worked as a carpenter or construction worker since 1988. (Exhibit 7, pages 146b – 146c) Claimant worked framing houses and apartment complexes from ages 15 through 26. (Transcript, pages 13, 14) From age 26, claimant has worked in commercial construction and concrete work. Claimant described both the construction and concrete work as heavy work. Much of the concrete work was on uneven ground. (Tr. p. 16) Claimant performed all of his carpenter and concrete work without any restrictions. (Tr. pp 60-64)

Claimant states that his first injury for Fund liability purposes was when a piece of steel fell from a crane and hit his left arm in September 2011. (Tr. p. 17) Claimant states he had a broken wrist and has a reduced range of motion as a result of this injury. (Tr. p. 18) Claimant was returned to work without restrictions by Dr. Reagan in March 2011. (Tr. p. 64) He has not received any treatment for his left wrist in over 15 years. (Tr. p. 65) Dr. Reagan did assign an eight percent rating to his left wrist based upon limited range of motion and grip strength. (Tr. p. 71; Ex. 1, p. 1) Claimant testified that he has a little bit of problems with grip strength. (Tr. p. 71) Claimant broke his left femur in 2003. (Tr. p. 22) Claimant was not given an impairment rating for this injury. (Tr. p. 67)

Claimant was working for Cameron Mitchel in September 2012. He was performing concrete construction at that time. Claimant testified that when working for Cameron Mitchel he would work between 40 – 60 hours per week. He said it was uncommon to work less than 40 hours per week. (Tr. p. 19) Claimant was not paid for holidays and did not receive any pay for Wednesday July 4, 2012 or Monday September 3, 2012— Independence Day and Labor Day. (Tr. pp. 18, 19) Weather did affect the number of hours claimant worked. Claimant also worked as a carpenter for Cameron Mitchel. In this position he was a foreman pouring concrete walls. He would supervise 2 – 8 employees. Claimant's calculation of wages to determine his average weekly rate and his workers' compensation rate is found in Exhibit 12, page 1 and defendants is found in Exhibit A, page 2. I find that the weeks that included non-paid holidays are non-representative weeks. I find that claimant's calculations accurately reflect his earnings and find claimant's average weekly wage is \$1,147.02 with two exemptions giving him a weekly rate of \$693.18.

Defendants have claimed an overpayment of temporary total disability (TTD), temporary partial disability (TPD) and permanent partial disability (PPD) benefits. (Ex. C, pp. 1, 2) Defendants paid claimant a rate of \$732.62 and assert that the correct rate was \$670.86. Defendants claimed a credit of \$5,443.70 for TTD, \$59.03 for TPD and \$2,340.49. Claimant does not dispute the fact that defendants paid at the rate of \$723.62.

As I have found the claimant's weekly payment to be \$693.18, defendants' overpayment calculation is not correct. I do not have sufficient information to recalculate the amount of TPD and therefore I cannot determine the amount, if any, of any overpayment or underpayment of TPD.

My calculation is that the amount of overpayment for TTD and PPD is \$39.44 per week. [$\$732.62 - \$693.18 = \39.44]

Using defendants' Exhibit B, pages 1 through 6 defendants paid 73 weeks of TTD. At the overpayment rate of \$39.44 per week, the total overpayment for TTD is \$2,879.12. [$\$39.44 \times 73 = \$2,879.12$]

Using defendants' Exhibit B, pages 6 through 8, defendants paid 39 weeks of PPD. At the overpayment rate of \$39.44 per week, the total overpayment for PPD is \$1,538.16. [$\$39.44 \times 39 = \$1,538.16$]

On September 24, 2014 claimant was at work, standing on a dumpster when he felt his right knee pop. Claimant said a piece of his knee cap broke and his knee became swollen. (Tr. p. 24) Claimant was taken off work the next day and was asked to return after two weeks by his supervisor. Claimant said that his physician allowed him to return with restriction, but his restrictions were not honored when he returned to work. (Tr. p. 25) Claimant used crutches for two weeks after his injury and then used a knee immobilizer or a brace for about a year and a half. (Tr. pp. 26, 31) On January 4, 2013 claimant had his first surgery on his right knee. (Tr. p. 28) Claimant testified that this surgery did not help his knee condition.

Claimant was working for Cameron Mitchell on a project at Mary Greeley Hospital on February 13, 2013 when his leg slipped while walking across some rebar that was loose and he twisted his right knee. (Tr. p. 29) Claimant made an appointment and saw Timothy Kenney, M.D. Claimant had a second right knee surgery on April 5, 2013. (Tr. 31) He was off work for a couple of weeks and returned to light duty in the shop. Claimant's restrictions were modified to sit-down work only and he worked one day in that position and was told not to report to work at that time. (Tr. p. 33)

Claimant's care was transferred to Scott Meyer, M.D. Claimant had a third surgery on October 1, 2013. (Tr. p. 34) Claimant had a fourth surgery on May 4, 2014 on his right leg. (Tr. p. 45) Claimant last saw Dr. Meyer in November 2014. There were no plans for additional medical care. Claimant said that he has asked for additional pain management and other treatment to help improve his leg. He has not been provided additional pain management. (Tr. p. 37) Claimant admitted that he had recently requested to see Dr. Meyer and the defendants had arranged an appointment. (Tr. p. 55) Dr. Meyer provided claimant permanent restrictions. Jerry Mitchell, vice president at Cameron Mitchell, testified that Cameron Mitchell was not able to permanently accommodate claimant's permanent restrictions. (Tr. p. 73) (See also Ex. 11, p. 181)

Claimant testified that since the time of his first injury he has not been able to walk normally and due to this, he has had difficulties with his left leg and left knee. (Tr. p. 40) Claimant first noticed symptoms around March 2013. Claimant said he told physicians about this problem and was told that they could not assist him as it was not part of his worker's compensation injury. (Tr. p. 41) Claimant attributed his left leg/knee problem to using crutches. He stated that he used a cane "... [S]olid for probably a year at least." (Tr. pp. 67, 68)

Claimant described his current right knee symptoms as his knee is constantly swollen and always hurts and sometimes his knee will lock. (Tr. p. 42) He said he has pain in his left knee as well. In addition to pain, his left knee pops and cracks and the

pain can go into his calf muscle. (Tr. p. 42) Claimant takes over-the-counter Advil for his knees. Claimant said he cannot kneel on his right knee and if he kneels on his left knee he needs help getting up. (Tr. p. 45)

After an extended period of unemployment, claimant got a job in August 2015 with Cleary Building Corporation. (Tr. p. 46) Claimant worked until December 2015 for Cleary Building Corp., building pole barns. Claimant said he had difficulty working in muddy conditions and quit this job. At the time of the hearing, he was employed by Tradesmen International; a temporary employment agency for construction workers. (Tr. p. 48) His job at the time of the hearing was to install cabinets at a school. He was making \$21.00 per hour. (Tr. p. 48)

Claimant had a work-related right knee injury in 1994 or 1995. His knee was "scoped" at that time. (Ex. D, p. 3, Tr. p. 55) Claimant did not recall if he informed Sunil Bansal, M.D., about this procedure on his knee. (Tr. p. 56) He broke his left femur in 1993. (Tr. p. 55) Claimant had no treatment on either knee between 2000 and his work injury in 2012. (Tr. p. 71)

Claimant went to a walk-in clinic on September 25, 2015 for his right knee. He was diagnosed with a dislocated patella and referred to the emergency department. (Ex. 2, p. 7) Claimant went to the emergency department and was referred to Iowa Ortho. (Ex. 1, p. 4) The medical records show that claimant was examined on September 27, 2012 after he injured his knee at work on September 24, 2012 by Dr. Kenney. Claimant denied any significant previous right knee injury. Dr. Kenney's assessment was knee sprain and right knee possible patellar dislocation with osteochondral fracture. Possible anterior cruciate ligament tear. Dr. Kenney recommended knee immobilization, crutches, pain medication and an MRI. (Ex. G, p. 2) On November 5, 2012, Dr. Kenney recommended surgery. (Ex. 4, p. 16) Claimant had knee surgery on January 4, 2013. The operative report shows the procedure performed was a, "Right knee arthroscopy with loose body removal and chondroplasty patella." (Ex. I, p. 1)

On February 25, 2013, Dr. Kenney examined claimant after claimant reinjured his right knee on some loose rebar on February 11, 2013. Dr. Kenney's diagnosis was. "Re-injury to RIGHT knee with suspected medial collateral ligament sprain and possible medial meniscus tear. Possible patellar subluxation." (Ex. G, p. 8) On March 25, 2013, Dr. Kenney diagnosed a "Meniscus- medial tear." (Ex. 4, p. 28) Dr. Kenney performed another right knee surgery on April 5, 2013. The post-operative diagnosis was "Medial meniscus tear right knee plus chondromalacia patella and degenerative arthritis right knee." (Ex. I, p. 5)

On August 14, 2013, Dr. Kenney provided a follow up examination of the claimant's right knee. Claimant was still having pain, swelling and painful catching and popping. (Ex. G, p. 11) X-ray at that time shows:

Results/Report

Three-view x-ray RIGHT knee ordered and evaluated today shows that he has definite moderate narrowing of the medial joint space. He has fairly significant lateral patellar positioning on the RIGHT knee. This is also present on his asymptomatic LEFT knee but much worse on the RIGHT.

(Ex. G, p. 12) Dr. Kenney's assessment and plan was:

Assessment/Plan

Status post patellar dislocation with persistent patellofemoral symptoms and underlying degenerative arthritis.

Patellar dislocation (836 3)

Meniscus – medial tear (836 0)

Degenerative Joint Disease – Knee (715 96)

Morbid obesity, BMI 40 or more (278 01)

We have done extensive treatment on his knee and remains highly symptomatic. He has had steroid injections and viscosupplementation and is bracing and modifying activities. He has had the initial arthroscopic debridement of the loose body off of his patella and also a secondary partial meniscectomy. The primary question is whether any type of more significant reconstructive procedure could be done for him. This would potentially involve more of a patellar realignment procedure. He also has moderate degenerative arthritis in the medial compartment of his knee, which is likely making it more difficult for his knee to recover from the injury. Consideration could also be given to some type of tibial osteotomy as well. I have recommended he see one of our sports reconstructive subspecialists to discuss these possible reconstructive options for his knee. Obviously, these are much greater magnitude procedures that would involve a long healing time and would mostly be trying to get his symptoms to a more tolerable level. We would consider these type of procedures prior to arthroplasty at his relatively young age. He asked if his knee could be aspirated today due to the large effusion. I aspirated the knee but did not inject steroid today as we did this previously. There was return of to [sic] 85mL of normal-appearing synovial fluid. I have cultured the fluid on at least two occasions in the past and cultures have always been negative and the fluid was always normal. Therefore, I did not send the fluid again for analysis. He will still be unable to work until further notice. Continue on his patellar stabilization exercises and use of brace as needed. Symptom management was discussed with the patient.

(Ex. G, pp. 12, 13)

On August 30, 2012 Scott Meyer, M.D., examined claimant. His diagnosis was osteoarthritis and morbid obesity. He advised claimant to use an assistive device when walking. He recommended the surgical option of, "[A]n opening wedge high tibial osteotomy combined with a tibial tubercle Fulkerson osteotomy." (Ex. G, p. 16) Dr. Meyer noted that claimant would need crutches for three months post-operative and he would not be comfortable walking for six months. (Ex. G, p. 16) Dr. Meyer performed this operation on October 1, 2013. (Ex. I, p. 7) On January 10, 2014, Dr. Meyer noted claimant was now able to use a single crutch. (Ex. G, p. 18)

On April 4, 2014, Dr. Meyer noted incomplete healing of the tibial tubercle osteotomy and recommended additional surgery. (Ex. 4, p. 65) On May 8, 2014, claimant had his fourth operation on his right knee and leg from the September 24, 2012 work injury. The operation was:

PROCEDURE:

1. Right leg tibial osteotomy exploration allograft, bone grafting, and use of infused BMP to tibial bone defect.
2. Removal of hardware.
3. Arthroscopic chondroplasty of the patella, grade 2 to 3, 15 x 15 mm. along the lateral patellar facet.

The post- operative diagnosis was:

POSTOPERATIVE DIAGNOSES:

Status post previous right high tibial osteotomy and tibial tubercle osteotomy with tibial tubercle osteotomy partial nonunion and patellofemoral chondromalacia.

(Ex. I, p. 10)

Claimant had a functional capacity examination (FCE) on October 14, 2014. (Ex. J, pp. 2 – 9) The FCE found that claimant could lift 75 pounds floor to waist, 65 pounds waist to shoulders and 45 pounds overhead. Claimant had an occasional tolerance for ladder climbing, kneeling, squatting and crawling. (Ex. J, p. 9)

On November 10, 2014, Dr. Meyer noted claimant was still having pain in his right knee; 4/5 out of a 10 pain scale. Claimant also informed Dr. Meyer that his left knee was causing increased amounts of pain. (Ex. G, p. 27) Dr. Meyer found claimant to be at MMI on this date and accepted the restriction contained in the FCE. (Ex. G, p. 28) Concerning claimant's left knee Dr. Meyer wrote:

Both he and his wife wanted to make sure that it was in his record that his LEFT knee has been giving him a lot of pain and problems now as well, and they associate that with his long period of time on his crutches. I did discuss with them that it is likely he has similar issues in this knee with the early arthritis changes. Treatment would be likely similar to what he had done in his RIGHT knee. I did state that unless he had a traumatic injury at work to his LEFT knee, just the fact that he was walking on crutches I do not consider a work-related aggravation. For now they will follow up when necessary.

(Ex. G, pp. 28, 29; Ex. 4, pp. 78, 79)

On May 19, 2015 Dr. Meyers answered a series of questions from defendants' counsel. Dr. Meyer concluded claimant sustained a work-related injury to his right knee on September 24, 2012. (Ex. G, p. 30) Dr. Meyer provided a 14 percent right lower extremity rating or 6 percent whole body. (Ex. G, p. 31) Regarding the claimant's left knee Dr. Meyer wrote,

I am not aware of any injury to his left knee as a result of his work activities of September 24, 2012. The left knee complaints could maybe temporarily be aggravated by his time on crutches, etc. However, that is not a significant or accelerating issue. There is no research data to suggest this, only speculation. He does have already preexisting arthritis in his left knee as well. He has also had previous fracture of that knee, which is likely the main cause of the arthritis in that knee as well as, again, his obesity, which are much greater factors leading to arthritis, that being obesity and previous injuries, than are favoring an opposite joint and putting more stress on a joint.

(Ex. G, p. 32)

On December 4, 2015, Dr. Bansal performed an independent medical examination (IME). (Ex. 6, pp. 106 – 131) In his IME, he noted that claimant had previously injured his left femur. (Ex. 6, p. 118) The IME does not reflect the fact that claimant had his right knee "scoped" in 1994 or 1995. He agreed with the rating that Dr. Meyer provide for the right lower extremity of 14 percent, but stated that 2 percent was related to the February 11, 2013 injury. (Ex. 6, p. 125) He provided restrictions of no lifting over 75 pounds, avoid standing/walking greater than 30 minutes and to avoid walking on uneven terrain. (Ex. 6, p. 125) Dr. Bansal opined that claimant had a separate injury on February 11, 2013, a right knee medial meniscal tear. (Ex. 6, p. 126) I find that claimant has a separate injury on February 11, 2013. This injury arose out of and in the course of his employment with Cameron Mitchell. Dr. Bansal provided the same restrictions for this injury. (Ex. 6, p. 127) Dr. Bansal opined that it would be medically prudent to limit prolonged ambulation due to the condition of his knees. (Ex. 6, p. 131)

Dr. Bansal found that claimant's left knee condition was "Aggravation of left knee osteoarthritis." (Ex. 6, p. 127) Dr. Bansal opined that claimant's left knee pain was a sequela of his right knee injuries. That claimant was engaged in activities that caused him to overcompensate on the left side, accelerating his knee degenerative changes. (Ex. 6, p. 128) Dr. Bansal provided a 7 percent impairment for the left lower extremity. (Ex. 6, p. 129) He did not believe claimant needed additional restriction for his left knee.

Dr. Bansal's diagnosis of claimant's left arm injury was a left scaphoid fracture and provided a 2 percent impairment rating. (Ex. 6, p. 130)

I find Dr. Meyer's conclusion that the left knee injury was not related or a sequela to the right knee injuries convincing. Dr. Meyer had very extensive contact with claimant, performed surgeries and explained why he did not believe claimant's left knee condition was related to his work injuries. Claimant has not carried his burden of proof on this issue.

I find that claimant has proven that he has a qualifying first injury for Fund liability purposes. While he has been able to work with his left wrist injury he has a slight impairment in range of motion and slightly less grip strength. I also find that the Fund is entitled to a credit for the 8 percent impairment rating that Dr. Reagan provided.

I find based upon Dr. Bansal's rating that claimant has a 12 percent injury to his right leg for the September 24, 2012. I find that he has an additional 2 percent injury to his right leg due to the February 11, 2013 injury. Claimant has a 14 percent scheduled member injury to his right leg.

Claimant was working as a carpenter at the time of the hearing. He still has the ability to do some carpentry work. However, his work building pole barns on uneven ground was unsuccessful work with concrete forms due to weight, uneven ground and use of ladders is not appropriate for claimant. Extended work on ladders doing carpentry work is not appropriate for claimant. I find claimant has a 30 percent loss of earning capacity.

Claimant has requested the costs of Dr. Bansal's IME of \$3,395.00 under Iowa Code 85.39. Defendants retained and obtained the opinion of Dr. Meyer before the opinion of Dr. Bansal. I find the costs to be reasonable.

Claimant has requested medical mileage in the amount of \$98.44. I find this cost to be related to claimant's work injuries.

RATIONAL AND CONCLUSIONS OF LAW

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).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 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.

I found that the September 24, 2012 work injury resulted in a 12 percent scheduled member injury to the right leg.

The convincing medical evidence is that claimant had a separate injury on February 11, 2013. Claimant had a right knee meniscal tear. There was no evidence that this was a sequela of the September injury, that it was a result of weakening to his right lower extremity due to the September injury.

I found that the February 11, 2013 work injury resulted in another 2 percent impairment to the right leg.

Defendants shall pay claimant a total of 14 percent, 35 weeks, for his work-related injuries.

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).

Claimant has proven a first qualify and a second qualifying injury for Fund liability purposes. Claimant's injuries are thus analyzed as an 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, 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 claimant had a 30 percent loss of earning capacity. While claimant was working at the time of the hearing, he has significant limitations. He cannot work on uneven ground or climb ladders for extended periods. He has shown significant motivation in returning to carpentry after the extensive surgeries he has performed on his leg. His experience is in carpentry and concrete forms. He has limited education. I find that claimant has a 30 percent industrial loss, entitling him to 150 weeks of permanent partial benefits from the Fund.

The Fund is entitled to a credit against the award of benefits for the prior loss and for the current loss. Claimant's injury of September 24, 2012, resulted in an impairment rating of 12 percent of the right leg. Claimant's injury of February 11, 2013 is another 2 percent for a total of 14 percent or 30.8 weeks [$220 \times 14\% = 30.8$]. The Fund is entitled to a credit of 8 percent for the arm, or 20 weeks [$250 \times 8\% = 20$].

The compensable value of the scheduled loss for purposes of granting the Fund credit under Iowa Code section 85.64 is the amount of the settlement when the settlement is in excess of the employer's statutory liability under Iowa Code section 85.34. Northrup v. Tama Meat Packing, File No. 724196 (Appeal March 19, 1990). The Fund is entitled to a total credit of 50.8 weeks of benefits. The Fund shall pay 99.20 weeks of benefits, after applying the credits.

Benefits commencing after the expiration of the payments due from the defendants Cameron Mitchell and Accident Fund. 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).

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6)

I previously found that the weeks that included non-paid holidays did not fairly represent claimant's earnings. Claimant testified that he usually worked over 40 hours. There was no testimony disputing this. The wage records generally support the claimant's testimony. Claimant's weekly workers' compensation rate is \$693.18.

Defendants contend they should receive a credit for the overpayment as against any award in this case. Claimant contends defendants' only remedy for credit is under Iowa Code section 85.34(5).

Iowa Code section 85.34(4) provides in relevant part:

If an employee is paid weekly compensation benefits . . . for a healing period . . . or for temporary partial disability . . . in excess of that required by this chapter. . . the excess should be credited against the liability of the employer for permanent partial disability. . . .

In Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 136-137 (Iowa 2010), claimant was paid healing period benefits and permanent partial disability benefits at a higher weekly rate than was later awarded at hearing. The agency found defendants had a right to a credit against the current permanency award for the overpayment of healing period benefits.

On appeal, the Supreme Court noted the parties agreed that defendants should receive a credit for the overpayment of permanency benefits, but they disagreed as to what type of credit would be permitted under chapter 85.

In interpreting Iowa Code section 85.34(5), regarding the recovery of an employee overpayment, the Supreme Court noted:

The plain language of section 85.34(5) directs the overpayment of any weekly benefits to be credited to payment of subsequent injuries. "Any" is commonly understood to have broad application. . . . by using a word with expansive import, we conclude that section 85.34(5) must be interpreted to apply to all overpayment of benefits. . . . as a result, Swiss Colony is only entitled to a credit for the overpayments against future benefits for a subsequent injury and not against future benefits for this injury.

Deutmeyer, 789 N.W.2d at 136-137.

Iowa Code 85.34(4) provides:

Credits for excess payments. If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated

Subsequent to the Deutmeyer case the commissioner has held that defendants are entitled to a credit against permanent benefits, temporary benefits that were overpaid. McBride v. Casey's Marketing Company, File No. 5037617 (Remand Decision. February 9, 2015) There is nothing in the record to suggest that defendants did not operate in good faith.

Defendants are entitled to a credit for the overpayment of TPD against the award of PPD in the amount of \$2,879.12 under 85.34(4). I found that the February 11, 2013 injury was a second injury. Because there has been a second injury with the same employer defendants are entitled to a credit for the overpayment of PPD in the amount of \$1,538.16 under 85.34(5).

IME

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 has met the conditions precedent for an award of the cost of an IME. Claimant is awarded the costs of \$3,395.00

Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Claimant is awarded the medical mileage of \$98.44.

Claimant has requested cost for the filing fee, \$100.00 and service fee, \$6.48.

I find that these costs are allowable under 876 IAC 4.33 and in my discretion, I award these costs to claimant.

ORDER

THEREFORE, IT IS ORDERED:

Defendants Cameron Mitchell and Accident Fund Insurance Company of America shall pay thirty five (35) weeks of permanent partial disability benefits at the rate of six hundred ninety-three and 18/100 dollars (\$693.18) commencing November 10, 2014.

The Second Injury Fund of Iowa shall pay claimant ninety-nine point two (99.2) weeks of permanent partial disability at the weekly rate of six hundred ninety-three and 18/100 dollars (\$693.18) commencing thirty- six (36) weeks after November 10, 2014.

Defendants Cameron Mitchell and Accident Fund Insurance Company of America shall pay the IME expense of three thousand three hundred ninety-five dollars (\$3,395.00).

Defendants Cameron Mitchell and Accident Fund Insurance Company of America shall pay the cost of one hundred six and 48/100 dollars (\$106.48).

Defendants Cameron Mitchell and Accident Fund Insurance Company of America shall pay the medical mileage in the amount of ninety-eight and 44/100 dollars (\$98.44).

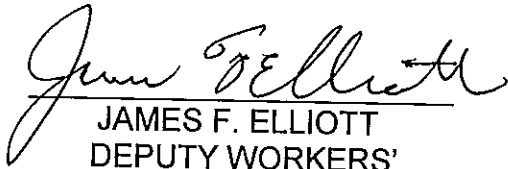
Defendants Cameron Mitchell and Accident Fund Insurance Company of America are entitled to a credit for temporarily total disability overpayment in the amount of two thousand eight hundred seventy-nine and 12/100 dollars (\$2,879.12) against the award of permanent partial benefits.

Defendants Cameron Mitchell and Accident Fund Insurance Company of America are entitled to a credit for permanent partial disability overpayment in the amount of one thousand five hundred thirty-eight and 16/100 dollars (\$1,538.16) against the award of permanent partial disability for the February 11, 2013 injury.

Defendants Cameron Mitchell and Accident Fund Insurance Company of America and the Second Injury Fund of Iowa shall pay any past due amounts in a lump sum and with interest as provided by law.

Defendants Cameron Mitchell and Accident Fund Insurance Company of America shall file subsequent reports as required by this agency.

Signed and filed this 14th day of October, 2016.


JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/kjw

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.