BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SUREYA IBRAHIM,

Claimant,

vs.

ABM INDUSTRIES,

Employer,

and

INDEMNITY INSURANCE COMPANY OF N.A.,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 5059441

ARBITRATION

DECISION

Head Notes: 1402.40, 1403.30, 1802, 1803, 1803.1

STATEMENT OF THE CASE

Sureya Ibrahim, claimant, filed a petition for arbitration against ABM Industries (hereinafter referred to as "ABM") as the employer and Indemnity Insurance Company of N.A. as the insurance carrier. Ms. Ibrahim also filed a claim against the Second Injury Fund of Iowa. All claims were heard simultaneously at an in-person hearing that occurred in Des Moines on September 27, 2018.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, 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 through 9, Defendants' Exhibits A through E, and Second Injury Fund's Exhibits AA through EE. All exhibits were received without objection.

Claimant testified on her own behalf. The employer and insurance carrier called Christine Wetzler to testify. The Second Injury Fund elected not to call any witnesses. The evidentiary record closed at the conclusion of the arbitration hearing.

Claimant's counsel filed a hearing brief at the commencement of the hearing. However, counsel for the employer and Second Injury Fund requested the opportunity to file post-hearing briefs. Their request was granted. Those parties filed post-hearing briefs on October 29, 2018, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Claimant's entitlement to healing period benefits from April 5, 2016 through April 14, 2016 and from January 28, 2017 through March 24, 2017, including an assertion by defendants that claimant refused an offer of suitable work and should forfeit any entitlement to healing period benefits after January 28, 2017.

2. Whether claimant's April 4, 2016 injury is limited to the left leg and should be compensated as a scheduled member injury; or whether the injury extends to the hip and/or back such that it should be compensated with industrial disability.

3. The extent of claimant's entitlement to permanent disability benefits from the employer and insurance carrier.

4. Whether claimant has established a compensable claim against the Second Injury Fund, including whether claimant has established both a first and second qualifying injury.

5. Whether claimant is entitled to permanent disability benefits and, if so, the extent of such permanent disability from the Second Injury Fund of Iowa.

6. Whether costs should be assessed against any party and, if so, the extent to which costs should be assessed.

FINDINGS OF FACT

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

Claimant, Sureya Ibrahim, is a 42-year-old woman. She was born in Sudan and immigrated to the United States in 1995 or 1996. Ms. Ibrahim has only a fourth grade education, obtained in Sudan. She has taken some English classes since her arrival in the United States. She is able to understand some English and can minimally write her name and address in English. She has no further education, certificates or degrees. (Claimant's testimony)

Ms. Ibrahim's work history is summarized at Joint Exhibit 9. Claimant has worked making sandwiches at Subway, in a deli, performed housekeeping services at a hotel, and performed elderly care services in addition to her position with ABM. Subsequent to her work at ABM, claimant worked in a cafeteria-type job filling juice glasses. She has not performed any skilled-type labor during her work career.

Claimant sustained an admitted injury while working at ABM on April 4, 2016. On that date, Ms. Ibrahim was working as a general cleaner, performing janitorial services. During her shift, she hit her knee on a desk. Claimant reported the injury to the employer and sought medical care that evening at the emergency room. The emergency room record, dated April 5, 2016, reflects reports of left knee pain and moderate left knee swelling. However, claimant did not report any hip or back pain at the emergency room. (Joint Ex. 1, p. 1)

The emergency room referred claimant to an orthopaedic surgeon, Todd Peterson, D.O. Unfortunately, claimant could not get an appointment for Dr. Peterson to evaluate her until April 15, 2016. Claimant remained off work during this period of time. The emergency room record notes that a custom work release form was completed, though none is in evidence. Nevertheless, I interpret the emergency room records to indicate that claimant was given a work release until evaluated by Dr. Peterson. (Joint Ex. 1, p. 4) Therefore, I find that Ms. Ibrahim was under medical restrictions and was not medically capable of performing substantially similar work between April 5, 2016 and April 14, 2016. During this period of time, claimant was awaiting further treatment with a specialist and clearly was not at maximum medical improvement.

Dr. Peterson evaluated Ms. Ibrahim on April 15, 2016. He noted reports of left knee pain, but noted the x-rays showed no objective evidence of fracture or acute abnormality of claimant's left knee. He noted the left knee was stable but reported that claimant reported "significant pain." Dr. Peterson documented no reports of left hip or low back pain on April 15, 2016. (Joint Ex. 2, p. 2)

Dr. Peterson ordered an MRI of claimant's left knee, which was performed on May 20, 2016. (Joint Ex. 2, pp. 2-3, 5) The MRI indicated a high-grade strain at the origin of the fibular collateral ligament. It also suggested possible transient dislocation of the patella. (Joint Ex. 2, p. 5)

Dr. Peterson attempted an extended course of physical therapy, a knee brace, and restricted return to work starting in May 2016. At her initial physical therapy evaluation on June 14, 2016, the physical therapist quotes claimant as saying, "I don't have any problem in my body except my knee." (Joint Ex. 3, p. 1) However, she did note that claimant had an antalgic gait. (Joint Ex. 3, p. 1)

Following the initial course of physical therapy, Dr. Peterson ordered a functional capacity evaluation (FCE). The FCE was conducted in October 2016 and recommended work in the sedentary category, mentioned a significant gait deviation as

a result of the left knee and decreased range of motion in the left knee. (Joint Ex. 4) Dr. Peterson permitted a restricted return to work after the FCE. (Joint Ex. 2, pp. 30, 34, 41) On January 20, 2017, Dr. Peterson released claimant to return to work without restrictions, other than to limit her work to five hours per day. (Joint Ex. 2, p. 41)

The employer offered claimant work consistent with the hourly restriction. Claimant returned to work. However, on January 27, 2017, claimant advised her employer that the vacuuming she was assigned was too physically demanding for her. The employer told her to go home and seek medical attention.

Claimant left the employer's premises but did not seek medical care. Claimant failed to return to work after January 27, 2017. She did not call the employer subsequently to report her absences or give a reason or excuse for the absence. However, I find that the reason for the absence was due to her left knee injury at work.

Following its personnel policy and employee handbook, the employer considered claimant to have voluntarily terminated her employment after three days of no-show and no-call. The employer formally terminated Ms. Ibrahim on February 3, 2017. The employer continued to offer claimant employment consistent with her medical restrictions between January 28, 2017 and February 2, 2017. However, claimant refused that offer of suitable employment by failing to present for work, failing to seek medical care, and failing to call in to report her absences.

On February 3, 2017, the employer terminated claimant's employment. From that date forward, the employer did not offer claimant suitable employment. Instead, it took the position that she had voluntarily terminated her employment. I find that Ms. Ibrahim did not take volitional steps to terminate her job or voluntarily quit her position with ABM between January 28, 2017 and February 3, 2017. Instead, she was involuntarily terminated due to her violation of company attendance policy. Given her work hour limitation, Ms. Ibrahim was not capable of performing substantially similar work between February 3, 2017 and March 24, 2017.

In March 2017, claimant submitted to another FCE. (Joint Ex. 5) This FCE suggested an invalid result due to inconsistent effort by claimant. (Joint Ex. 5, p. 15) The therapist also noted that he observed claimant after the FCE walking to her car. The therapist documented that claimant demonstrated improved gait and pace walking to her car, as compared to the abilities demonstrated during the FCE. (Joint Ex. 5, p. 9)

After reviewing the March 2017 FCE, Dr. Peterson opined that claimant was released to return to work without permanent restriction. (Joint Ex. 2, p. 48) Dr. Peterson declared claimant's left knee to be at maximum medical improvement as of March 24, 2017. (Joint Ex. 2, p. 51) Dr. Peterson opined that Ms. Ibrahim sustained a seven percent permanent impairment of the left leg as a result of the April 4, 2016 work injury. (Joint Ex. 2, p. 51)

Claimant sought an independent medical evaluation performed by Sunil Bansal, M.D. on May 17, 2018. Dr. Bansal diagnosed claimant with sacroiliitis as well as left lateral subluxation of the patella. Dr. Bansal specifically documented palpable lumbar tenderness into the left sacroiliac joint. Dr. Bansal causally connected both diagnoses to the April 4, 2016 injury at ABM. (Joint Ex. 7)

Dr. Bansal concurred with Dr. Peterson's declaration of maximum medical improvement for the left knee occurring on March 24, 2017. He also concurred with Dr. Peterson's seven percent permanent impairment rating of the left leg. However, Dr. Bansal opined that claimant also sustained permanent impairment of the low back. Specifically, Dr. Bansal assigned claimant a three percent permanent impairment of the whole person as a result of the low back condition. Dr. Bansal opined that claimant should be assigned permanent work restrictions. He adopted the recommendations of the first FCE performed in October 2016. (Joint Ex. 7, p. 10)

Dr. Bansal also addressed claimant's Second Injury Fund claim by evaluating claimant's right arm. He diagnosed claimant with a right elbow dislocation and as being status post right elbow surgery following the 1984 injury to claimant's right arm. Dr. Bansal opined that claimant has residual weakness in supination and that she sustained a three percent permanent impairment of the right upper extremity as a result of the 1984 right arm injury. (Joint Ex. 7, p. 11) He recommended work restrictions for the right arm that would limit claimant to "no lifting greater than 10 pounds with the right hand." (Joint Ex. 7, p. 11)

Defendants sought a supplemental report from Dr. Peterson on the issue of claimant's low back claims. Dr. Peterson opined:

> I do not believe she has any problems with her low back or sacroiliac joints. She complained of no pain when I pushed on these areas and the pain was lateral and inferior to this in the muscle belly. She had bilateral lower extremity severe weakness which was a curious finding. Despite the physical injury which she had I also believe there are cultural issues at work in this injury. I am certainly not an expert on foreign cultures, but having completed a Middle Eastern and Muslim cultural intelligence certification, there is no question that Ms. Ibrahim's view of this injury and what it has done to her plays a part in her current curious physical symptoms.

(Joint Ex. 2, p .58)

Claimant then obtained a responsive report from Dr. Bansal. Dr. Bansal criticized Dr. Peterson's examination of claimant with respect to the diagnosis of sacroiliitis. Dr. Bansal also noted, "low back complaints by Ms. Ibrahim were made at her physical therapy visit on July 25, 2016 and throughout her course an altered gait was mentioned." (Joint Ex. 7, p. 15)

Considering these competing medical opinions, I note that there is consensus on the date of maximum medical improvement for the left knee. I accept those opinions and find that claimant achieved maximum medical improvement for her left knee on March 24, 2017.

I also note consensus between Dr. Peterson and Dr. Bansal that claimant sustained a seven percent permanent impairment of the left knee. Again, I accept those opinions as accurate and specifically find that claimant has proven a seven percent impairment of the left leg as a result of the April 4, 2016 work injury.

The physicians differ on whether claimant sustained a permanent injury to her low back as a result of the April 4, 2016 injury. As Dr. Bansal noted, there are limited mentions of back symptoms in physical therapy records. There is no mention of any back symptoms in Dr. Peterson's medical records. Dr. Peterson evaluated and treated claimant numerous times over the course of 11 months. He was in a unique position to speak with claimant multiple times, examine her multiple times, and to assess whether she had ongoing low back symptoms and whether those were related to the April 4, 2016 injury.

Dr. Bansal criticizes Dr. Peterson's evaluation of claimant for low back. I am very skeptical that Dr. Peterson performed a substandard orthopaedic examination. I am also very skeptical that he failed to identify low back symptoms or perform competent evaluations of claimant continuously over an 11-month period. I find the opinion of Dr. Peterson to be more persuasive under these circumstances. I find that claimant failed to prove she sustained a permanent injury to her low back as a result of the April 4, 2016 work injury. Therefore, I find that the situs of claimant's April 4, 2016 work injury is limited to the left leg.

I am also skeptical of Dr. Bansal's use of the first FCE. Claimant underwent additional physical therapy after the initial FCE. She provided inconsistent effort in the second FCE and the therapist documented improved function after she left the FCE. Ignoring those findings and reports to rely upon the earlier FCE is not credible or convincing in my estimation.

As for an initial or first qualifying injury, Ms. Ibrahim asserted she sustained a broken right arm in 1984. She testified that she fell on some stairs, broke her arm, and required medical care. She testified that she had reduced strength in her right arm after the injury. However, no medical records are in evidence documenting the 1984 injury or treatment related thereto. Ms. Ibrahim sought no medical treatment for the right arm after the initial care in 1984. She carried no permanent work restrictions as a result of the right arm throughout her life until evaluated by Dr. Bansal. I found Ms. Ibrahim's testimony credible on this issue and identified no contrary evidence in the record. Therefore, I find that claimant sustained an injury to her right arm in 1984.

Dr. Bansal's opinions pertaining to the right arm are not rebutted in this evidentiary record. I accept Dr. Bansal's permanent impairment and find that claimant

has proven a three percent permanent impairment of the right arm as a result of the 1984 injury. However, I am again skeptical of Dr. Bansal's permanent restrictions related to the right arm. Although another physician does not formally contradict those restrictions, I find Dr. Bansal's restrictions not credible.

Claimant clearly worked above the ten-pound lift level recommended by Dr. Bansal prior to her left knee injury. Ms. Ibrahim clearly did not require a ten-pound lifting limit for her right arm injury before her April 4, 2016 work injury. Dr. Bansal's suggestion to the contrary is not credible or accepted.

I am also troubled because Dr. Bansal suggests claimant has a loss of strength with supination in the right arm. Yet, the FCE in October 2016 demonstrated normal range of motion and strength with supination. (Joint Ex. 4, p. 11) I suspect that the October 2016 FCE was not focused upon claimant's right arm, given that the FCE was the result of the left knee injury. Nevertheless, Dr. Bansal's reliance upon the October 2016 FCE for restrictions, while rejecting its findings pertaining to right upper extremity strength leaves very little confidence in Dr. Bansal's adoption of the October 2016 FCE for purposes of permanent restrictions.

Nevertheless, I find that claimant has proven permanent disability to both her right arm as a result of the 1984 injury and to her left leg as a result of the April 4, 2016 work injury. I also find that claimant has proven that these injuries have produced a combined loss of future earning capacity. As noted above, I am skeptical and reject the permanent work restrictions offered by Dr. Bansal. Yet, I accept that claimant likely has reduced strength to some extent in her right arm. I also accept that she has ongoing symptoms with her left knee.

Ms. Ibrahim has not demonstrated significant motivation to return to work or continue employment. She obtained subsequent employment but then left that employment due to a scheduling conflict with her son's school. She has applied for three jobs in approximately 9 months since leaving that job. She is not motivated to find alternate employment, despite her lack of income.

Claimant's failure to produce credible work restrictions for either of these injuries makes it difficult to assess her actual future loss of earning capacity. Her lack of motivation makes it difficult to assess her true future earning capacity. I find that Ms. Ibrahim has proven only a modest loss of future earning capacity. Considering her limited educational background, her employment history, her age, lack of motivation to return to work, her failure to prove definitive work restrictions, and her limited permanent impairment, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Ms. Ibrahim has proven she sustained a twenty percent loss of future earning capacity as a result of the combined effects of the 1984 right arm and April 4, 2016 left knee injuries.

CONCLUSIONS OF LAW

The parties stipulated that claimant sustained a work injury on April 4, 2016 and that the injury caused both temporary and permanent disability. (Hearing Report) However, the parties submitted a dispute about the nature of the injury. Specifically, claimant alleges she sustained a left leg as well as hip and low back injuries as a result of the April 4, 2016 work injury and that she should be compensated with industrial disability benefits pursuant to Iowa Code section 85.34(2)(u).

ABM contends that claimant's injuries are limited to the left knee, or left leg, and should be compensated as a scheduled member injury pursuant to Iowa Code section 85.34(2)(o). If the employer's position is accepted, claimant contends that she sustained a prior right hand, or arm, injury in January 1984, and that she is entitled to an award of benefits from the Second Injury Fund of Iowa. The Second Injury Fund disputes whether claimant has proven either a first or a second qualifying injury to establish entitlement to benefits.

Therefore, the initial disputed issue I must decide is whether the April 4, 2015 injury caused injury to, or materially aggravated, claimant's low back or left hip. 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).

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 N.W. 598 (1936).

Having found the opinions of Dr. Peterson to be most persuasive in this situation, I found that claimant failed to prove an injury, or material aggravation, to her left hip or low back. Therefore, I conclude that claimant failed to carry her burden of proof to establish she sustained a compensable injury to her left hip or low back as a result of the April 4, 2016 work injury.

Instead, I found that the situs of the April 4, 2016 work injury is limited to the left knee and left leg. I conclude that claimant is entitled to compensation for a scheduled member, left leg injury pursuant to Iowa Code section 85.34(2)(o).

Dr. Peterson and Dr. Bansal concurred that claimant's impairment rating totals seven percent of the left leg. Given the consistency of these impairment ratings, I accepted those as accurate and found that claimant has proven a seven percent permanent impairment of the left leg as a result of the April 4, 2016 work injury. Iowa Code section 85.34(2)(o) provides that a leg injury should be compensated based upon a 220-week schedule of benefits.

Iowa Code section 85.34(2)(v) provides that permanent disability should be awarded proportional to the maximum scheduled compensation. Blizek v. Eagle Signal Co., 164 N.W.2d 84, 87 (Iowa 1969). Seven percent of 220 weeks totals 15.4 weeks. Therefore, claimant has established entitlement to an award of 15.4 weeks of permanent partial disability benefits against ABM. Iowa Code section 85.34(2)(o), (v).

In addition to permanent disability benefits, Ms. Ibrahim also seeks an award of additional healing period benefits. 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).

The initial healing period in dispute is from April 5, 2016 through April 14, 2016. Having found that Ms. Ibrahim was under medical restrictions, was not medically capable of performing substantially similar work between April 5, 2016 and April 14, 2016, and that further care was recommended at that time, I conclude that claimant has proven entitlement to healing period benefits from April 5, 2016 through April 14, 2016. Iowa Code section 85.34(1).

Ms. Ibrahim also asserts entitlement to healing period benefits from January 28, 2017 through March 24, 2017. ABM contends that claimant forfeited any right to healing period benefits during this period of time pursuant to Iowa Code section 85.33(3).

Iowa Code section 85.33(3) provides:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Refusal of suitable work by an employee results in forfeiture of any temporary disability or healing period benefits pursuant to Iowa Code section 85.33(3). Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). Voluntarily quitting employment can be considered a refusal of suitable work disqualifying an employee from benefits pursuant to Iowa Code section 85.33(3). Id.

However, the employer bears the burden to establish the prerequisites of Iowa Code section 85.33(3). Koehler v. American Color Graphics, File No. 1248489 (Appeal February 2005). Specifically, the employer must establish by a preponderance of the evidence that work was offered to the claimant, that the work was suitable, and that claimant intentionally refused the offered work. Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012); Raymie v. JB Schott Family Farms, File No. 5041943 (Appeal October 2016); Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (Appeal April 2004); Woods v. Siemens Furnas Control, File Nos. 1303082, 1273249 (Arbitration July 2002) (Final agency action by Commissioner Trier).

Iowa Code section 85.33(3) only applies if the employer offers suitable work to the employee. Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa

2010). Termination by itself is not sufficient grounds to disqualify an employee from healing period benefits under Iowa Code section 85.33(3). Raymie v. JB Schott Family Farms, File No. 5041943 (Appeal October 2016); Terhark v. Hope Haven, File No. 5031853 (Appeal February 2013); Alonzo v. IBP, Inc., File No. 5009878 (Appeal October 2006); Franco v. IBP, Inc., File No. 5004766 (Appeal February 2005). The Commissioner has held that some bases for termination, such as theft and gross misconduct, are bases for disqualification of benefits pursuant to Iowa Code section 85.33(3). Reynolds v. Hy-Vee, Inc., File No. 5046203 (Appeal October 2017). However, termination of employment by the employer is not a basis for forfeiture under Iowa Code section 85.33(3) unless the cause of the termination is unrelated to the work injury. Raymie v. JB Schott Family Farms, File No. 5041943 (Appeal October 2016).

In this case, the employer asserts that claimant is disqualified and forfeits any claim for healing period benefits because she failed to report to work and failed to call in to the employer for a period of three days from January 28, 2017 through January 30, 2017. The employer terminated claimant on February 3, 2017 pursuant to its personnel policy. I found that the employer continued to offer claimant employment from January 28, 2017 through February 2, 2017. During that period of time, the employer offered work consistent with claimant's medical restrictions. Claimant refused the work, asserting that she could not physically perform the work assigned. Accordingly, I found that the employer proved by a preponderance of the evidence that it offered claimant suitable work from January 28, 2017 through February 2, 2017. I conclude that claimant forfeited any claim for healing period benefits during this period of time. Iowa Code section 85.33(3).

However, on February 3, 2017, the employer terminated claimant's employment pursuant to its personnel policies. Although the employer considers this a voluntary termination as a result of its three-day no-show/no-call policy, claimant was off work during this period of time due to symptoms from her work injury. Claimant remained under medical restrictions as a result of this work injury on the date of termination.

Upon terminating claimant, the employer was no longer offering claimant suitable work. Having reached those findings of fact, I conclude that the employer is not able to carry its burden of proof to establish that it offered suitable work and that claimant refused the suitable work. Accordingly, I conclude that the employer failed to prove forfeiture of benefits from February 3, 2017 through March 24, 2017.

I found that Ms. Ibrahim was not working between February 3, 2017 and March 24, 2017. I also found that she remained under medical restrictions during this period of time and was, therefore, not capable of returning to substantially similar employment. Having found that Ms. Ibrahim achieved maximum medical improvement on March 24, 2017, I conclude that Ms. Ibrahim has established entitlement to healing period benefits from February 3, 2017 through March 24, 2017.

As I perceive fairness and justice, this seems like an odd result to me. Claimant was released to return to work five hours per day without restrictions. The employer

offered work consistent with those restrictions. The claimant asserted an inability to perform the duties assigned, but did not seek further evaluation or modification of the work restrictions. Then, the employee quits showing up for work or calling in to notify the employer. Having an established personnel policy, which claimant should have been aware, the employer terminated employment.

Realistically, an employer will typically follow its attendance policy and personnel policies. Employee attendance is important for most employers. An employer cannot force an employee to present for work. When an employee fails to appear for work repeatedly, it is not realistic to expect an employer to maintain that employee indefinitely. Yet, when this employer actually takes action, acts in a responsible business manner, and complies with its own established personnel policies, it forfeits a defense in this worker's compensation case. That seems like an odd and perhaps unjust result to the undersigned. Nevertheless, as the case law has developed on this issue, I believe this is the mandated legal result in this case. Therefore, I conclude that claimant is entitled to healing period benefits from February 3, 2017 through March 24, 2017.

The parties dispute the proper commencement date for permanent disability. Permanent partial disability benefits commence on the earliest date when claimant returns to work, is medically capable of performing substantially similar work, or achieves maximum medical improvement. Iowa Code section 85.34(1); Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016). Payment records in evidence demonstrate that claimant was paid healing period benefits from April 14, 2016 through May 31, 2016. No healing period benefits are claimed between June 1, 2016 and November 21, 2016. Therefore, I conclude that claimant's initial healing period entitlement terminated on May 31, 2016. I conclude that permanent partial disability benefits commence on June 1, 2016. Iowa Code section 85.34(1); Evenson, 881 N.W.2d at 372.

Having concluded that claimant's work injury on April 4, 2016 is limited to a scheduled member injury, I must also consider her claim against the Second Injury Fund of Iowa. 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).

Having found that Ms. Ibrahim sustained a compensable left leg injury on April 4, 2016 that caused permanent disability, I conclude that she has proven the second qualifying injury. As for an initial, or first qualifying injury, Ms. Ibrahim asserted she sustained a broken right arm in 1984. Having accepted claimant's testimony about her right arm injury, I conclude that Ms. Ibrahim has proven a qualifying first injury.

Although the right arm injury had minimal impact or effect on claimant's earning capacity prior to the left knee injury in April 2016, Dr. Bansal opined that claimant has difficulty with right forearm pronation and supination. He also opined that claimant's right arm is weaker than her left arm. Dr. Bansal assigned a three percent permanent impairment to claimant's right upper extremity as a result of the prior right arm fracture in 1984. I accepted that opinion and impairment rating as accurate. Therefore, I conclude that claimant has proven she sustained a first qualifying injury to her right arm in 1984.

The Second Injury Fund disputes whether claimant sustained any permanent disability, or industrial disability, as the result of either or the combined effects of the 1984 right arm or 2016 left knee injuries. However, I found that the combined effect of those injuries has had a modest impact on claimant's earning capacity. Although I did not accept Dr. Bansal's permanent restrictions for either the right arm or the left knee, I found that Ms. Ibrahim did prove permanent disability.

In determining the combined effects of both injuries and resulting industrial disability, I noted that 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 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 industrial disability shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34. However, the Second Injury

Fund is entitled to a credit for all permanent disability attributable to either of the qualifying scheduled member injuries.

In this case, I found that Ms. Ibrahim sustained a 20 percent loss of earning capacity as a result of the combined effects of the first and second qualifying injuries. This is equivalent to 100 weeks of permanent partial disability benefits. However, I already concluded that the employer owes claimant 15.4 weeks of permanent disability benefits for the 2016 left knee injury. Claimant sustained a three percent permanent impairment of the right arm as a result of the 1984 injury. An arm is compensated on a 250-week schedule. Iowa Code section 85.34(2)(m). Three percent of the arm is equivalent to 7.5 weeks of permanent disability benefits.

Therefore, I conclude that the Second Injury Fund of Iowa is entitled to 22.9 weeks of credit against the industrial disability award. Reducing the 100 weeks by the 22.9-week credit, I conclude that claimant is entitled to an award from the Second Injury Fund totaling 77.1 weeks of benefits.

Second Injury Fund's benefits commence upon the expiration of the employer's obligation to pay benefits for the second injury. The employer's liability for payment of permanent partial disability benefits commenced on June 1, 2016. The Second Injury Fund is entitled to 15.4 weeks of credit for that injury, which means the employer's liability for the second injury ended on September 16, 2016. Second Injury Fund liability, therefore, commences on September 17, 2016. Iowa Code section 85.64(1).

Finally, claimant seeks an award of costs. Costs are awarded at the discretion of this agency. Iowa Code section 86.40. In this case, claimant established entitlement to benefits from the employer and prevailed on two healing period claims that were disputed. I conclude it is appropriate to assess costs in some amount.

However, claimant has not obtained a significant award from the employer. I did not rely upon the medical opinions of Dr. Bansal to any significant degree. Therefore, exercising my discretion I conclude that it is appropriate to assess claimant's filing fee of $100.00 but no other costs against the employer. No costs will be assessed against the Second Injury Fund.

ORDER

THEREFORE, IT IS ORDERED:

The employer and insurance carrier shall pay claimant healing period benefits from April 5, 2016 to April 14, 2016 and from February 3, 2017 to March 24, 2017.

The employer and insurance carrier shall pay claimant fifteen point four (15.4) weeks of permanent partial disability benefits commencing on June 1, 2016.

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).

The employer and insurance carrier shall be entitled to a credit for all weekly benefits paid to date, as stipulated to on the hearing report.

Defendants shall reimburse claimant's costs in the amount of one hundred dollars ($100.00).

The employer and insurance carrier 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.

The Second Injury Fund of Iowa shall pay claimant seventy-seven point one (77.1) weeks of benefits commencing on September 17, 2016.

All weekly benefits shall be paid at the stipulated rate of two hundred forty-four and 70/100 dollars ($244.70).

Signed and filed this 30th day of January, 2019.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.