BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MYRON MEADER,	FILED	
Claimant,	JUN 06 2018	File No. 5057325
vs.	WORKERS COMPENSATION	ARBITRATION
SECOND INJURY FUND OF IOWA,		DECISION
Defendant.		Head Note Nos.: 1803, 1804, 3200

STATEMENT OF THE CASE

Myron Meader filed a petition for arbitration seeking workers' compensation benefits from The Second Injury Fund of Iowa. The claim was initially filed against his employer as well, Cedar Rapids Ball Club, Inc. Prior to hearing, claimant settled against the employer and insurance carrier.

The matter came on for hearing on October 26, 2017, before deputy workers' compensation commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of Joint Exhibits 1 through 8; as well the sworn testimony of claimant, Myron Meader. The record was held open for the claimant and employer to submit the Agreement for Settlement. The parties specifically requested the agency take administrative notice of the agreement. The parties briefed this case and the matter was fully submitted on December 1, 2017.

ISSUES

1. Whether the claimant suffered a first qualifying injury to his left hand in 2003, in order to invoke the applicability of the Second Injury Fund Compensation Act.

2. The total credit to which the Second Injury Fund is entitled is disputed.

3. The claimant alleges permanent and total disability and has alleged the odd-lot theory. The Fund disputes that claimant is permanently and totally disabled.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at the time of the injury.

2. The parties agree that the claimant suffered a compensable and qualifying injury to his left leg which arose out of and in the course of employment on June 10, 2015. The parties all agree that this injury resulted in some level of both permanent and temporary disability.

3. Affirmative defenses have been waived.

4. The weekly rate of compensation for any permanent disability benefits is $199.72 per week. This is the minimum rate for the time period involved.

5. Medical benefits are not in dispute.

6. Claimant resolved his claim against the employer and insurance carrier on an agreement for settlement.

FINDINGS OF FACT

Myron Meader is a pleasant 61-year-old retiree from Cedar Rapids, Iowa. He attended high school in Mechanicsville, Iowa but he did not graduate. He eventually earned a GED from Kirkwood Community College. He is married and has two grown children. In 1973, he enlisted in the United States Marine Corps. He has an excellent work history and presented at hearing as a credible person. He testified live at hearing. I find his testimony to be highly credible. The pace of his testimony was slow and precise. There was nothing about his demeanor which caused me any concern for his truthfulness.

After serving in the Marine Corps, Mr. Meader served in the Army Reserves while he was working at Rockwell Collins in Cedar Rapids, Iowa. In the Marines, he was a tank commander. At Rockwell, claimant began as a production worker and eventually became a skilled machine operator. He completed a four year apprenticeship as a machinist, and eventually worked in the model shop where he would build items to specification. In 1984, he took his skills and began working for Cope Plastics (hereafter, Cope) in Cedar Rapids, as a skilled machinist. He produced models. This involved some heavy lifting and physical work. It was also quite skilled. He worked until 2013, when he was forced to retire due to unrelated heart problems. Since then, he has earned $1,600 per month from Social Security Disability due to this condition.

In 2003, Mr. Meader sustained a significant injury to his left thumb or hand while working for Cope. He testified he was working on a table saw. It kicked back, dragging his left thumb into the saw. This eventually resulted in a partial amputation of the left thumb. The only medical evidence in the file related to the left thumb and hand is the expert medical opinion of claimant's IME physician, John Kuhnlein, D.O. (Joint Exhibit 4) Dr. Kuhnlein documented the following.

> **Other previous worker's compensation injuries** -- Mr. Meader injured his left thumb while working for Cope Plastics. He says that he was

> working with a table saw and it kicked back, dragging his left thumb into the saw with amputation of the distal left thumb and a fracture of the PIPJ and first MCPJ. Dr. Loth performed ORIF. Mr. Meader says that he has left thumb pain with activity, numbness circumferentially about the left thumb, and stiffness. He is uncertain if he received an impairment rating for this injury.

(Jt. Ex. 4, page 6)

Dr. Kuhnlein provided the only functional disability rating in the record for this injury. He rated the functional loss at 20 percent of the left hand "because of the involvement to the MCPJ." (Jt. Ex. 4, p. 10)

The metacarpal phalangeal joint (MCPJ) is the joint that connects the metacarpal bone, which is the bone that connects the thumb to the hand. I find that the disability extends into the claimant's left hand.

After recuperating from the left hand injury, Mr. Meader returned to work without incident or restriction and continued on until he was forced to retire due to his heart condition. Mr. Meader was dissatisfied with retirement and immediately began searching for work. In February 2013, he applied for work with the Cedar Rapids Ball Club, which operates the minor league baseball Cedar Rapids Kernels. (Jt. Ex. 5, p. 2) He was initially hired as a concession server and was promoted quickly to assistant stand manager. His job primarily involved working in the concession stands preparing food and serving customers. There was also some clean-up work involved. It involved a great deal of standing. (Jt. Ex. 5, p. 1) Mr. Meader earned $9.00 per hour and worked during the baseball season on a part-time basis. There is a stipulation in the record that his gross earnings were $81.00 per week.

Mr. Meader sustained an incident of injury to his left leg, which arose out of and in the course of his employment, on June 10, 2015. Mr. Meader's left knee was already impaired. He initially injured his left knee in the Army Reserves in approximately 1976. He told Dr. Kuhnlein he stepped into a gopher hole and hyperextended his knee, sustaining an anterior cruciate ligament tear. Since the original injury, he underwent numerous surgeries on his left knee. In approximately 2004, Mr. Meader had an implant placed in his left knee, which eventually required a revision surgery. In 2013 and 2014, he had two total knee replacement surgeries. There is no question whatsoever that Mr. Meader's knee was already in pretty bad shape when he began working for the Cedar Rapids Ball Club. He conceded in testimony that he had been instructed by his physicians not to do any running or jumping and to avoid squatting, bending and kneeling on his left knee. There was instability and weakness present. (Jt. Ex. 4, p. 3) At the time of hearing, Mr. Meader was receiving approximately $3,000 per month for a 100 percent service-connected disability from the VA.

On June 10, 2015, Mr. Meader slipped and fell in the food service area. He

broke his left femur. (Jt. Ex. 2, p. 1) After he fell, he was instructed not to move because of deformity in his leg. He was initially transported by ambulance to Mercy Hospital in Cedar Rapids. Later the same day, he was moved to the University of Iowa Hospitals and Clinics. (Jt. Ex. 2, pp. 1-4) Shortly after his arrival, Michael Willey, M.D., performed surgery to repair his "closed left femoral shaft periprosthetic fracture." (Jt. Ex. 1, pp. 1-2, 6-7)

After further treatment, including substantial physical therapy, Nicholas Noiseux, M.D., assumed treatment. Dr. Noiseux did not recommend further surgery. He recommended strength conditioning and use of a cane, or other assistive device, to protect against falls. (Jt. Ex. 1, p. 24) In March 2016, Mr. Meader underwent a functional capacity test which recommended limitations on his standing and walking to an occasional basis. (Jt. Ex. 3, p. 23) His restrictions did place him in the medium work category, however, precluded him from continuing to work for the Cedar Rapids Ball Club. "Functional Limitations: Patient is unable to: Frequently carry Food items weighing 10# a distance of 10 feet using 2 hands. Occasional climbing stairs. . . . He is currently on work restrictions of no lifting >20#, no standing > 5 min, no stooping or bending; walking only short distances." (Jt. Ex. 3, pp. 21-23) Dr. Willey placed the claimant at maximum medical improvement at around the same time and assigned a 20 percent functional impairment rating to the left leg as a result of the work injury. (Jt. Ex. 1, p. 30) He assigned restrictions of no more than 10 minutes on feet at a time; no sitting for long periods of time; and no long distance walking. (Jt. Ex. 1, p. 32) Dr. Willey indicated that future treatment could include "non-steroidal anti-inflammatory medications, bracing, physical therapy, regular follow-up with radiographs and possibly revision surgery including but not limited to hardware removal." (Jt. Ex. 1, pp. 30-31) He specifically indicated, however, that any revision knee arthroplasty surgery would not be considered to be related to the work injury. (Jt. Ex. 1, p. 31)

Dr. Kuhnlein performed an independent evaluation in August 2017. He assigned an impairment rating of 22 percent of the left leg and recommended a cane, or other assistive device such as a walker. (Jt. Ex. 4, pp. 9-10) Dr. Kuhnlein also recommended sitting or standing occasionally, with ability to change positions as needed; bending and using stairs occasionally; and walking, stooping, squatting, crawling or kneeling rarely. (Jt. Ex. 4, p. 10)

CONCLUSIONS OF LAW

The first question is whether the claimant has proven a first qualifying injury and disability such that Second Injury Fund liability is triggered.

The first unnumbered paragraph of section 85.64 states:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of

> another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "*Second Injury Fund*" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Iowa Code 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 workers with disabilities by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978).

The Fund is responsible only 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).

The first issue presented here is whether the claimant suffered a first qualifying loss. Claimant alleges his first loss was suffered in an injury to his left hand in 2003. The Fund contends that he merely suffered a loss to his left thumb, which is not a qualifying loss under the Act.

The Iowa Supreme Court has provided guidance on this issue in Stumpff v. Second Injury Fund of Iowa, 543 N.W.2d 904, 907 (Iowa 1996).

> We think the industrial commissioner has correctly allowed recovery for a hand injury when the site of the injury is at the point where the bones of the finger connect to the bones of the hand (phalangeal-metacarpal joint), Vogel v. Second Injury Fund, File No. 925720, p. 2 (App. Decision April 30, 1993), and also has correctly denied benefits where only the finger was injured, Clester v. Second Injury Fund, File No. 990938, p. 3 (Arb. Decision February 2, 1994).

Id. at 907.

The facts of this case are directly on point with Stumpff. In 2003, claimant suffered an amputation injury to his thumb which also fractured his "PIPJ and first MCPJ." (Jt. Ex. 4, p. 6) "MCPJ" refers to metacarpal phalangeal joint, the same joint discussed in Stumpff. Dr. Kuhnlein assigned a 20 percent impairment rating to the left hand using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, on the basis of "the involvement of the MCPJ." (Jt. Ex. 4, p. 10)

The Fund argues forcefully that "all of the criteria within the figures and tables of the AMA Guides upon which Dr. Kuhnlein based his impairment rating relate to the thumb, as opposed to the hand or the arm. (JE8, pp. 1-5)." (Fund Brief, pp. 9-10) The Fund further argues that claimant had not experienced any industrial loss from this injury and only received restrictions for this condition in September 2017. (Fund Brief, p. 10)

After reviewing all of the evidence in the record, I conclude that Mr. Meader suffered a permanent functional loss to his left hand in 2003. His permanent functional disability rating from that injury was based largely on the damage caused to his metacarpal phalangeal joint which is located at the point where the bones of the thumb connect to the bones of the hand. This is based upon the unrebutted report of Dr. Kuhnlein, as well as Mr. Meader's testimony. Based upon binding precedent from the Iowa Supreme Court, this is a first-qualifying loss to the hand. Dr. Kuhnlein's impairment rating of 20 percent of the hand is the best evidence of claimant's permanent loss of use suffered as a result of this injury. Consequently, the Fund is entitled to a credit of 38 weeks as a result of this first qualifying injury.

While the left hand injury, by itself, would have caused only a minor or insignificant industrial disability, it does not change the fact that it is a first-qualifying loss.

After reviewing all of the evidence in the record, I conclude Mr. Meader suffered a second injury on June 10, 2015. This was an unfortunate and catastrophic injury to his left leg, which was already damaged significantly at his knee. The medical evidence in the file demonstrates that Mr. Meader suffered a "prosthetic distal femur fracture" which was surgically repaired. (Jt. Ex. 1, pp. 6-7) Mr. Meader then underwent a fairly lengthy and difficult course of treatment which included physical therapy, restrictions, medications, additional testing and consideration of a second surgery. (Jt. Ex. 1, pp. 8-36) While the injury was undoubtedly an independent injury to the left leg, it also materially aggravated claimant's underlying, and well-documented, knee instability. (Jt. Ex. 1, pp. 15-16)

In March 2016, Dr. Willey provided an impairment rating of 20 percent of the lower extremity which was attributable to the work injury. (Jt. Ex. 1, p. 30) He did not rate, and was apparently never asked to rate, the pre-existing damage to the knee,

including total knee replacement. Claimant was last examined by Dr. Willey in June 2016, and his ongoing instability and pain were documented in detail. (Jt. Ex. 1, p. 35) He was using a walker, however, was unable to walk more than a block without significant instability. Mr. Meader expressed frustration and indicated he has frequent falls resulting from this. (Jt. Ex. 1, pp. 35-36)

The Fund does not dispute that the June 10, 2015, work injury is a qualifying injury under the Act. The Fund contends, however, that it is entitled to a credit for Mr. Meader's entire left leg disability, including the pre-existing disability in his left knee. The Fund contends that the claimant suffered a pre-existing functional disability in his left leg and it is entitled to a credit for this.

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).

The expert medical evidence in the record, however, does not establish any loss of function of the left leg beyond 20 or 22 percent, regardless of the legal theory. I find that the claimant has suffered a 22 percent loss of function of his left leg as a result of the June 10, 2015, work injury, entitling the Fund to a credit of 48.4 weeks of benefits (22 percent of 220 weeks).

Thus, the Fund is entitled to a total credit from all of claimant's prior injuries of 86.4 weeks.

The next issue is the nature and extent of claimant's industrial disability.

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

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

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.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 29, 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. 1982).

I find that the claimant has met his burden of proof that he is permanently and totally disabled.

The reality of this case is that the claimant was already significantly disabled at the time he took his position with the Cedar Rapids Ball Club. In his late-50's, the combination of his left hand impairment, his non-work related left knee impairment, as well as his non-work related heart condition, rendered the claimant's job universe quite small even before his June 10, 2015, work injury. The June 10, 2015, work injury, and resulting damage and limitations to his left leg, has caused him to be essentially unemployable in the competitive job market.

At the age of 61, with his extremely limited mobility and ability to stand, it is highly unlikely the claimant would be able to secure any type of meaningful employment. While Mr. Meader is obviously bright and industrious, his educational background is limited. He was already limited from using his past work skills. His functional impairment from the injury is severe and ongoing. The more he uses his leg, the less stable it is. His treating physician, Dr. Willey, assigned severe restrictions, including not being on his feet for more than ten minutes at a time, no sitting for long periods and no distance walking. (Jt. Ex. 1, p. 32) His functional capacity evaluation essentially confirmed that he could no longer perform his work in concessions. (Jt. Ex. 3, pp. 21-23) Dr. Kuhnlein verified these significant restrictions. (Jt. Ex. 4, p. 10) The claimant testified about his inabilities due to his condition and confirmed his significant disability. He cannot walk more than a block at a time and has to use an assistive device such as a cane or a walker.

Even assuming that the claimant has some marketable management skills, it is nearly impossible to imagine the type of work he would be capable of performing at this time. The reality is, claimant was more of a lead worker for the Cedar Rapids Ball Club. He was a working supervisor. There is no evidence that claimant did scheduling or any classic, supervisory or management functions. He was actively serving customers in a concession stand. His employer was unable to find any other position for him or accommodate his position in any way. I find that claimant has met his burden of proving permanent total disability.

ORDER

THEREFORE IT IS ORDERED

All benefits shall be paid at the stipulated rate of one hundred ninety-nine and 72/100 dollars ($199.72) per week.

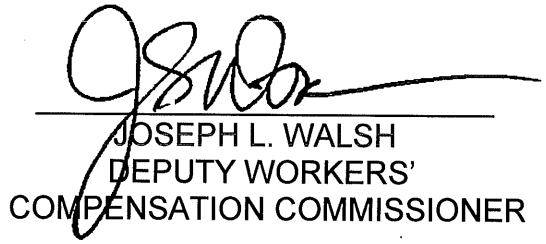
The Second Injury Fund of Iowa shall pay claimant permanent total disability commencing eighty-six and four-tenths (86.4) weeks following March 26, 2016.

All accrued benefits shall be paid in a lump sum.

Pursuant to Iowa Code section 85.30, 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).

Pursuant to rule 876 IAC 3.1(2), the Second Injury Fund shall file subsequent reports of injury as required by this agency.

Signed and filed this 6th day of June, 2018.



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JLW/srs

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.