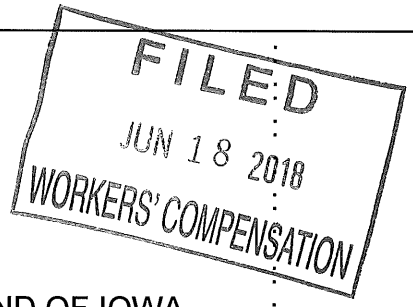
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



SCOTT O'HARA,	:	File No. 5058876
Claimant,	:	ARBITRATION
vs.	:	DECISION
SECOND INJURY FUND OF IOWA,	:	
Defendant.	:	Head Note No.: 1803

Claimant Scott O'Hara filed a petition in arbitration on May 16, 2017, alleging he sustained an injury to his right hand while working for the defendant, United Parcel Service ("UPS") on September 18, 2015, and seeking benefits from the defendant, Second Injury Fund of Iowa ("the Fund"). The Fund filed an answer on June 5, 2017. UPS and its insurer, the defendant, Liberty Mutual Insurance Corp. ("Liberty Mutual") filed an answer on June 10, 2017, admitting O'Hara sustained a work injury. O'Hara entered into an agreement for settlement with UPS and Liberty Mutual, which was approved by the Workers' Compensation Commissioner on February 22, 2018.

An arbitration hearing was held on June 1, 2018, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Sarah Baumgartner represented O'Hara. O'Hara appeared and testified. Assistant Attorney General Jonathan Bergman represented the Fund. Joint Exhibits ("JE") 1 through 3, Exhibit 1, and Exhibits A and B were admitted into the record. The record was held open through June 8, 2018, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. The Fund waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between UPS and O'Hara at the time of the alleged injury.

2. O'Hara sustained an injury on September 18, 2015, which arose out of and in the course of his employment with UPS.

3. If the injury is found to be the cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded is May 22, 2016.

4. At the time of the alleged injury O'Hara's gross earnings were $1,013.47 per week and he was married.

5. Medical benefits are no longer in dispute.

6. Prior to the hearing O'Hara was paid 12.5 weeks of compensation at the rate of $641.74 by UPS and Liberty Mutual for permanent partial disability benefits with a rating of five percent to the upper extremity.

ISSUES

1. Is the alleged injury a cause of temporary disability during a period of recovery?

2. Is the alleged injury a cause of permanent disability?

3. Has O'Hara sustained an industrial disability?

4. If O'Hara has sustained a permanent industrial disability, what is the extent of disability?

5. How many exemptions is O'Hara entitled to?

6. What is O'Hara's rate?

7. Does the Second Injury Compensation Act apply to this case?

FINDINGS OF FACT

O'Hara is married and has four children. (O'Hara Testimony) O'Hara testified at the time of his work injury he claimed his four children as dependents. (O'Hara Testimony) At the time of the hearing O'Hara was fifty-two. (O'Hara Testimony) O'Hara is right hand dominant. (JE 2, page 5)

O'Hara graduated from high school in Des Moines, and attended eighteen months of college at Des Moines Area Community College ("DMACC") in criminal justice. (O'Hara Testimony) O'Hara did not graduate from DMACC. (O'Hara Testimony)

O'Hara has worked as a bellman for a hotel, athletic footwear sales person, delivery driver, and sporting goods assistant manager. (O'Hara Testimony) He has also operated a courier business where he delivered checks, and a cable installation business, where he installed cable into homes. (O'Hara Testimony; Ex. 1, p. 1)

O'Hara has worked for UPS since June 1996, as a loader. (O'Hara Testimony) O'Hara worked for UPS part-time for ten years while he was self-employed. (O'Hara Testimony) In 2006 he moved to full-time employment because his employment with

UPS was more stable than his self-employment. (O'Hara Testimony) O'Hara works nights and his wife works during the day. (O'Hara Testimony) O'Hara begins his shift at 11:00 p.m., and he works Sunday through Thursday. (O'Hara Testimony)

O'Hara spends four hours per day loading and unloading boxes, and four hours per day working on SPA. (O'Hara Testimony) O'Hara testified his position requires him to lift between one and 150 pound boxes four hours per day. (O'Hara Testimony) O'Hara reported his position requires him to walk sixty percent of the time and he stands for his entire shift. (O'Hara Testimony) O'Hara scans and labels boxes, which requires bending, but no kneeling. (O'Hara Testimony) The smaller boxes weighing under ten pounds are kept in a bag. (O'Hara Testimony) When he works with the small boxes O'Hara has to squat down to scan the boxes. (O'Hara Testimony)

O'Hara receives two ten minute breaks during the day and an hour break for lunch. (O'Hara Testimony) During his ten minute break O'Hara sits or lies down on the conveyor belt. (O'Hara Testimony) He did not do that before his work injury. (O'Hara Testimony) Before his work injury O'Hara would walk over to see his friends and now he just sees them during his lunch break. (O'Hara Testimony)

O'Hara's job description lists the physical demand level as very heavy. (Ex. B, p. 1) The job description provides O'Hara is required to lift up to ten pounds frequently, up to sixty-six percent of the time, push and pull up to fifty pounds frequently, up to sixty-six percent of the time, lift and carry up to seventy pounds occasionally, up to thirty-three percent of the time, and push or pull one hundred pounds or more up to thirty-three percent of the time. (Ex. B, p. 1) The job description also provides O'Hara's position requires constant walking and standing up to 100 percent of the time, occasional stair and ladder climbing up to thirty-three percent of the time, and frequent sustained forward bending, repetitive squatting, and repetitive bending up to sixty-six percent of the time. (Ex. B, pp. 1-2)

O'Hara is a full-time employee for UPS and he receives health, dental, and vision benefits. (O'Hara Testimony) O'Hara is paid $30.64 per hour and he regularly works one hour of overtime per week. (O'Hara Testimony) During the winter holiday season from November 24th through January 1st, O'Hara works between five and ten hours of overtime per week. (O'Hara Testimony)

O'Hara testified he "blew out his knee" while officiating high school football in 2008. (O'Hara Testimony) O'Hara received treatment for his knee from Patrick Sullivan, M.D., an orthopedic surgeon, the day after the injury. (O'Hara Testimony) O'Hara reported he tore his anterior cruciate ligament and cartilage from the bone. (O'Hara Testimony) O'Hara underwent magnetic resonance imaging, which confirmed the injury, and he received surgery the next day. (O'Hara Testimony) O'Hara later developed additional pathology in his right knee.

In 2014, O'Hara underwent a right total knee replacement with Dr. Sullivan. (JE 1, pp. 1-2) O'Hara testified he continues to have problems with his right knee. (O'Hara Testimony) He reported he experiences shooting pain when he stands on hard surfaces at work. (O'Hara Testimony) O'Hara testified he cannot bend his right knee, he has difficulty kneeling, he cannot squat, and he cannot climb ladders. (O'Hara Testimony) O'Hara reported he is unable to kneel or squat at home, and he cannot kneel at church. (O'Hara Testimony)

O'Hara testified after his knee injury he had to give up softball, water skiing, snow skiing, and swimming. (O'Hara Testimony) O'Hara's wife likes to walk five or six miles per day, and he reported he cannot walk with her for over two miles. (O'Hara Testimony) O'Hara relayed when he walks for two miles with his wife he cannot walk with his wife the next day. (O'Hara Testimony)

O'Hara testified the pain in his knee is worse when he has no time to stop for a break during the holiday season. (O'Hara Testimony) O'Hara relayed the pain in his leg makes it hard for him to sleep. (O'Hara Testimony) O'Hara has not received any additional treatment for his knee in the past year, but reported Dr. Sullivan told him he will need another knee replacement in fifteen to twenty years. (O'Hara Testimony)

On September 18, 2015, O'Hara was unloading a trailer for UPS when a fifty pound box collapsed and struck his right hand. (O'Hara Testimony) O'Hara testified his right two middle fingers were numb and his hand was swollen. (O'Hara Testimony) O'Hara was taken to Mercy Hospital where he received x-rays and his wrist was placed into a splint. (O'Hara Testimony) The x-rays did not reveal a tear or a break in his right upper extremity. (O'Hara Testimony) O'Hara returned for his shift the next day, but went home, and he returned to work after the weekend. (O'Hara Testimony)

O'Hara continued to have problems with his right upper extremity. (O'Hara Testimony) UPS arranged an appointment for O'Hara with Michael Gainer, M.D., an orthopedic surgeon. (JE 2, p. 4) O'Hara was placed in a cast, and Dr. Gainer removed his cast on November 24, 2015. (JE 2, p. 4) Dr. Gainer assessed O'Hara with a sprain of the metacarpophalangeal joint of the right thumb and obesity. (JE 2, p. 4) Dr. Gainer documented "[h]e did not appear to have any pain with stress testing of the UCL of the thumb MP joint. His complaints seem to be out of proportion to the physical exam" and he ordered occupational therapy. (JE 2, p. 4)

During a follow-up appointment on January 12, 2016, Dr. Gainer documented O'Hara complained of constant, fluctuating pain in his right thumb, he described as aching, aggravated by gripping, and relieved by rest. (JE 2, p. 5) Dr. Gainer noted O'Hara believed he had improved since his prior visit and he wanted to return to full duty. (JE 2, p. 5)

On January 27, 2016, O'Hara attended a follow-up appointment with Dr. Sullivan following his earlier knee replacement. (JE 1, p. 2) Dr. Sullivan documented O'Hara was not having any problems or difficulties and he was satisfied with his postoperative pain reduction. (JE 1, p. 2) Dr. Sullivan documented O'Hara walked without a limp and he was comfortable during ambulation and resting positions. (JE 2, p. 3) Dr. Sullivan encouraged O'Hara to continue a walking program, and exercise program to work on range of motion of his knee, and to return for routine follow-up care. (JE 3, p. 3)

On February 25, 2016, O'Hara returned to Dr. Gainer reporting mild, daily symptoms in his right thumb. (JE 2, p. 7) Dr. Gainer documented O'Hara continued to complain of pain in the thumb, wrist, and index finger. (JE 2, p. 7) Dr. Gainer reviewed recent magnetic resonance imaging of O'Hara's right upper extremity and found there was no evidence of any pathology that would require surgery and there was no good explanation for his pain. (JE 2, p. 7) Dr. Gainer found he had nothing to offer O'Hara, and he released him to full duty. (JE 2, p. 7)

Dr. Gainer prepared an opinion letter on September 2017. (JE 2, p. 9) Dr. Gainer noted he had placed O'Hara at maximum medical improvement and released him to full duty without restrictions on February 25, 2016. (JE 2, p. 9) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Gainer assigned O'Hara a zero percent permanent impairment rating. (JE 2, p. 9)

Sunil Bansal, M.D., conducted an independent medical examination for O'Hara on October 23, 2017. (JE 3) Dr. Bansal examined O'Hara and reviewed his medical records. (JE 3) Dr. Bansal diagnosed O'Hara with a right thumb medial collateral ligament strain, median neuropathy, severe right knee arthritis, and status post right cemented total knee replacement, and agreed with Dr. Gainer O'Hara reached maximum medical improvement on February 25, 2016. (JE 3, pp. 18-19) Dr. Bansal opined O'Hara's right hand diagnoses were caused by the September 18, 2015 work injury. (JE 3, p. 18) With respect to the right hand/wrist, using Figures 16-12, 16-15, 16-8b, and 16-9 of the AMA Guides, Dr. Bansal opined,

> [t]humb MP flexion of 40 degrees = 2% thumb impairment, 1% hand impairment, or 1% upper extremity impairment.
>
> In addition, per Table 16-15 he is assigned a (39% x 10%) = 4% upper extremity impairment for his median nerve sensory loss.
>
> Total is 5% upper extremity impairment.

(JE 3, p. 19) With respect to his right knee, using Table 17-33 of the AMA Guides, Dr. Bansal assigned a thirty-seven percent lower extremity impairment for the right knee replacement. (JE 3, p. 19) Dr. Bansal noted he believed O'Hara would benefit from and should have restrictions, but O'Hara did not want permanent restrictions because permanent restrictions could jeopardize his employment with UPS. (JE 3, p. 20) Dr.

Bansal recommended restrictions of no lifting greater than twenty pounds occasionally, or ten pounds frequently with the right hand, and no frequent kneeling or squatting. (JE 3, p. 20)

At hearing O'Hara reported his ring and middle fingers are numb, and he experiences shooting pain in his index finger. (O'Hara Testimony) O'Hara relayed he has a difficult time gripping and grabbing with his right hand and his hand locks in a claw position and he has to manually stretch out his hand at work. (O'Hara Testimony) O'Hara has a difficult time grasping and picking up objects with his right hand, and reported objects slip out of his hand, and his hand is weak. (O'Hara Testimony) O'Hara continues to experience numbness in his ring and middle fingers. (O'Hara Testimony) He also experiences an itching or burning in the area of the ball of the thumb and his whole hand hurts. (O'Hara Testimony)

O'Hara uses his left arm for lifting and grabbing, and he uses his flat palm of his right hand to balance items. (O'Hara Testimony) Before his work injury O'Hara primarily used his right arm for lifting and grabbing. (O'Hara Testimony)

O'Hara testified at home his son lifts items for him and performs the outdoor work in the yard. (O'Hara Testimony) O'Hara reported he cannot open jars or pop bottles with his right hand, and must open containers with his left hand. (O'Hara Testimony)

When he worked with his brothers and brother-in-law O'Hara climbed ladders and ran wire in basements. (O'Hara Testimony) O'Hara reported he would no longer be able to do that type of work because his knee would give out. (O'Hara Testimony)

O'Hara has worked for UPS for twenty-two years. (O'Hara Testimony) O'Hara originally planned to work for UPS for thirty years, and he now hopes he will make twenty-five years. (O'Hara Testimony) O'Hara is uncertain how long he will be able to handle the pain. (O'Hara Testimony) O'Hara testified he is concerned no employer will hire him because he would have a difficult time passing a physical examination. (O'Hara Testimony)

O'Hara has not discussed any restrictions with UPS. (O'Hara Testimony) He has not received any accommodations for his right upper extremity or his right lower extremity from UPS. (O'Hara Testimony) O'Hara reported UPS requires that he be able to perform all of his job duties, or he cannot be employed there. (O'Hara Testimony)

The Workers' Compensation Commissioner approved an agreement for settlement between O'Hara, UPS, and Liberty Mutual on February 21, 2018. (Ex. A) In the agreement for settlement, the parties agreed O'Hara sustained an injury arising out of and in the course of his employment on September 18, 2015, at the time of the injury O'Hara was married, and entitled to two exemptions, with gross weekly earnings of $1,013.47, and his rate was $641.74. (Ex. A, p. 1) O'Hara, UPS, and Liberty Mutual

agreed O'Hara sustained a five percent permanent partial disability to his right arm, resulting in 12.5 weeks of compensation commencing on February 25, 2016. (Ex. A, p. 1)

CONCLUSIONS OF LAW

I. The Fund's Liability

O'Hara seeks benefits through the Fund. The Fund contends it has no liability in this case. Under Iowa Code section 85.64,

> [i]f 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 his division and 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.

Thus, an employee is entitled to Fund benefits if the employee establishes: (1) the employee sustained a permanent disability to a hand, arm, foot, leg, or eye, a first qualifying injury; (2) the employee subsequently sustained a permanent disability to another hand, arm, foot, leg, or eye, through a work-related injury, a second qualifying injury; and (3) the employee has sustained a permanent disability resulting from the first and second qualifying injuries exceeding the compensable value of the "previously lost member." Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 398-99 (Iowa 2010).

A. First Qualifying Loss

O'Hara contends he sustained a first qualifying loss to his right knee. O'Hara testified he injured his knee in 2008 while officiating high school football. (O'Hara Testimony) O'Hara received surgery in 2008, and a right total knee replacement in 2014 with Dr. Sullivan. (JE 1) O'Hara testified he continues to have problems with his right knee, including difficulties with kneeling, squatting, and climbing ladders. (O'Hara Testimony) O'Hara has not received any treatment for his right knee since 2016. (JE 1, p. 2)

Dr. Bansal diagnosed O'Hara with severe right knee arthritis and status post right cemented total knee replacement. (JE 3, p. 18) Dr. Bansal assigned a lower extremity impairment rating of thirty-seven percent. (JE 3, p. 19) While O'Hara did not want

permanent restrictions because he believes permanent restrictions could jeopardize his employment with UPS, Dr. Bansal recommended permanent restrictions of no frequent kneeling or squatting. (JE 3, p. 20) Dr. Bansal is the only physician who has provided an opinion concerning O'Hara's right leg. The Fund did not seek an opinion regarding O'Hara's right leg from any physician. Dr. Bansal's opinion is unrebutted. The record supports O'Hara has sustained a first qualifying loss to his right knee.

B. Second Qualifying Loss

O'Hara contends he sustained a second qualifying loss to his right hand and wrist. The Fund rejects O'Hara's assertion.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of an in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Two physicians have provided expert opinions in this case, Dr. Gainer, the treating orthopedic surgeon, and Dr. Bansal, an occupational medicine physician who conducted an independent medical examination for O'Hara. Both experts document O'Hara sustained a work injury, but disagree on permanency. Dr. Gainer opined O'Hara had sustained a zero percent permanent impairment and recommended no permanent restrictions. Dr. Bansal assigned a five percent upper extremity impairment and recommended permanent restrictions of no lifting greater than twenty pounds occasionally or ten pounds frequently with the right hand. I find Dr. Bansal's opinion more persuasive than Dr. Gainer's opinion.

Dr. Bansal most recently examined O'Hara. No rebuttal opinion was obtained from Dr. Gainer or from another physician. At hearing O'Hara testified he has ongoing problems with his right hand and wrist. Dr. Bansal examined O'Hara and provided objective findings from his exam compared with O'Hara's left upper extremity. (JE 3, p. 17) Dr. Gainer's impairment rating does not provide any objective findings or comparisons with the other extremity. O'Hara has established he sustained a permanent impairment to his right upper extremity, and a second qualifying loss.

B. Industrial Disability

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and

nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016). When determining the Fund's liability, the trier of fact subtracts the two scheduled amounts for the first and second qualifying injuries from the full amount of the industrial disability. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 813 (Iowa 1994)

Following his work injury O'Hara returned to his employment with UPS. At hearing he continued to work for UPS. O'Hara has not sustained a reduction in pay since the work injury. O'Hara has not requested and he is not receiving any accommodations from UPS for his right knee or his right hand and wrist.

At the time of the hearing O'Hara was fifty-two. He has worked in manual labor for most of his working career, but he also has experience working as a manager and as a business owner. O'Hara is a high school graduate, and he attended DMACC for eighteen months, but he did not graduate. I found O'Hara articulate at hearing. I believe he is capable of retraining. I also believe his prior management skills could be used to secure other employment. O'Hara has sustained permanent impairments to his right lower extremity, and his right upper extremity. Considering Dr. Bansal's recommended restrictions, and all of the factors of industrial disability, I conclude O'Hara has sustained a thirty percent industrial disability, which entitles him to 150 weeks of permanent partial disability benefits.

The Fund is responsible only for the amount of the industrial disability from which the employee suffers, reduced by the compensable value of the first and second injuries. Second Injury Fund v. Nelson, 544 N.W.2d 258, 269 (Iowa 1995). In the event the credits due to the Fund exceed the industrial disability resulting from the qualifying injuries, the fund has no liability. Crudo v. Second Injury Fund of Iowa, Case No. 98-828 (Iowa App. July 23, 1999).

The two scheduled amounts for O'Hara's first and second qualifying injuries must be subtracted from 150 weeks. The thirty-seven percent impairment to the right lower extremity results in 81.4 weeks of permanent partial disability benefits. Iowa Code § 85.34(2)(o) (2015) (allowing a maximum of 220 weeks). The five percent impairment to the right upper extremity results in 12.5 weeks of permanent partial disability benefits. Id. § 85.34(2)(m) (allowing a maximum of 250 weeks). The first and second qualifying injuries total 93.9 weeks. The Fund is entitled to a credit of 93.9 weeks. O'Hara is awarded 56.1 weeks of permanent partial disability benefits from the Fund.

II. Rate

During the hearing O'Hara testified he is married and at the time of his work injury he claimed his four children on his income tax return as dependents. (O'Hara Testimony) Prior to the hearing O'Hara entered into an agreement for settlement with UPS and Liberty Mutual agreeing at the time of the alleged injury he was married and entitled to two exemptions, with an average weekly wage of $1,013.47, and the applicable weekly rate was $641.74. (Ex. A, p. 1) O'Hara agreed at the time he

entered the agreement for settlement he was represented by counsel. (O'Hara Testimony)

The Fund alleges O'Hara's statements in the agreement for settlement have preclusive effect in the dispute between O'Hara and the Fund. O'Hara asserts the agreement for settlement is not binding on O'Hara. The Fund's argument involves the doctrine of issue preclusion. Commissioner Godfrey previously determined issue preclusion does not apply to an agreement for settlement because the agency's approval of a settlement "makes no determination as to the merits of any aspect of the claim [and] [i]ssue preclusion does not apply to issues that have not been litigated." Grahovic v. Second Injury Fund of Iowa, 2009 WL 3382042 (App. Oct. 9, 2009) (citing Hunter v. City of Des Moines, 300 N.W.2d 121 (1981). In Grahovic, the agency re-affirmed the earlier case of Bevins v. Farmstead Foods, File Nos. 834865, 877458, 888705 (App. Nov. 26, 1991), noting:

> [t]he only preclusive effect of an agreement for settlement approved by this agency is upon the parties who entered into that agreement. Such an agreement does not establish the compensability of any injury or the extent of claimant's entitlement to disability benefits in a subsequent claim against the Second Injury Fund of Iowa.

Id. The Fund was not a party to the agreement for settlement between O'Hara, UPS, and Liberty Mutual. Under Grahovic, the representations made by O'Hara are not given preclusive effect in this case. This finding does not end the inquiry.

It was clear at the start of the hearing that rate was an issue. The parties disputed the rate on the hearing report. O'Hara alleged on the hearing report he was entitled to six exemptions. The Fund asserted he was entitled to two exemptions.

O'Hara testified that at the time of his work injury he was married with four dependents. O'Hara did not submit his 2015 income tax return as an exhibit. His attorney did not make a request to leave the record open to submit his tax return. No additional witnesses testified on his behalf. O'Hara bears the burden of proving his number of exemptions. While O'Hara's representations concerning the number of exemptions and rate in the agreement for settlement between O'Hara, UPS and Liberty Mutual are not given preclusive effect, his representations in the agreement for settlement on his exemptions and rate are inconsistent with his testimony at hearing. I find O'Hara has not met his burden of proof in this case. The record evidence supports O'Hara was married at the time of the work injury and entitled to two exemptions. His weekly rate is $641.74.

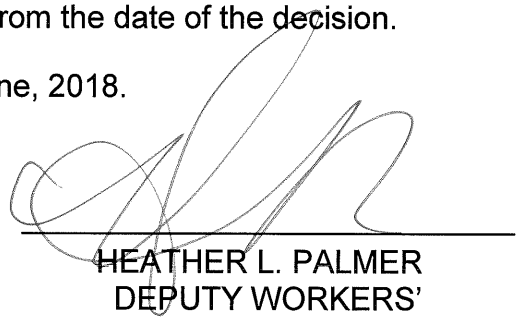
ORDER

IT IS THEREFORE ORDERED, THAT:

The Fund shall pay O'Hara fifty-six point one (56.1) weeks of permanent disability benefits, at the rate of six hundred forty-one and 74/100 dollars ($641.74) per week, commencing after all benefits have been paid by UPS and Liberty Mutual.

Interest accrues on unpaid Fund benefits from the date of the decision.

Signed and filed this 18th day of June, 2018.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Sarah M. Baumgartner
Attorney at Law
100 Court Ave., Ste. 425
Des Moines, IA 50309
sarah@hedberglaw.com

Jonathan Bergman
Assistant Attorney General
Special Litigation
Hoover State Office Bldg.
Des Moines, IA 50319-0106
Jonathan.bergman@ag.iowa.gov

HLP/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.