

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BOUNSANA SENSOUK,

FILED

Claimant,

FEB 20 2019

vs.

WORKERS COMPENSATION

File No. 5060801

NATIONWIDE OFFICE CLEANERS,

ARBITRATION DECISION

Employer,

and

TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

Head Note Nos.: 1803, 2907, 3202

STATEMENT OF THE CASE

Bounsana Sensouk, claimant, filed a petition for arbitration against Nationwide Office Cleaners, as the employer, and Travelers Property Casualty Company of America, as the insurance carrier. Ms. Sensouk also filed a claim against the Second Injury Fund of Iowa. All claims were heard simultaneously at an in-person hearing, which occurred in Des Moines on January 17, 2019.

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 4, Claimant's Exhibits 1 through 5, Employer's Exhibits A through C, and Second Injury Fund Exhibits AA through DD. All exhibits were received without objection.

Claimant testified on his own behalf. No other witnesses testified. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. Claimant and the Second Injury Fund of Iowa filed post-hearing briefs on February 11, 2019, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits from the employer and insurance carrier as a result of the August 4, 2017 right arm injury.
2. Whether claimant has established a compensable claim against the Second Injury Fund, including whether claimant has established a qualifying first injury.
3. The extent of claimant's entitlement, if any, to benefits from the Second Injury Fund of Iowa.
4. Whether claimant's filing fee should be assessed as a cost of this contested case proceeding.

FINDINGS OF FACT

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

Bounsana Sensouk works for Nationwide Office Cleaners. On August 4, 2017, Mr. Sensouk performed cleaning services for Nationwide Office Cleaners at a meat packing plant. On that date, he sustained a stipulated work related injury to his right arm when his hand and arm were caught in a machine. (Joint Exhibit 2, page 1; Hearing Report)

Mr. Sensouk sustained a displaced and unstable right radius shaft fracture, which required an open reduction and internal fixation on August 5, 2017. As a result of the August 4, 2017 accident, Mr. Sensouk also sustained a right palm laceration that required operative repair. (Joint Ex. 2, p. 6) Mr. Sensouk had a protracted recovery from this injury with ongoing symptoms. He did not achieve maximum medical improvement for almost eight months. (Joint Ex. 3, p. 14)

All parties concur that the August 4, 2017 injury is limited to the right arm. Two physicians offered permanent impairment ratings relative to the injury. Claimant obtained an independent medical evaluation performed by Jacqueline M. Stoken, D.O. on October 24, 2018. Dr. Stoken identified loss of range of motion in Mr. Sensouk's right thumb and right wrist. Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Stoken assigned an impairment rating of nine percent of

the right upper extremity as a result of the August 4, 2017 injury. (Claimant's Ex. 1, p. 7)

The employer and insurance carrier obtained an independent medical evaluation performed by Benjamin S. Paulson, M.D. Dr. Paulson identified loss of range of motion in claimant's right wrist and a loss of pronation in claimant's right forearm. Dr. Paulson did not perform measurements or offer opinions as to claimant's right thumb. Dr. Paulson also utilized the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and opined that claimant sustained a three percent permanent impairment of the right upper extremity as a result of the August 4, 2017 work injury. (Employer's Exhibit A)

As I review the permanent impairment ratings offered by Dr. Stoken and Dr. Paulson, I note that both physicians identified three percent permanent impairment of the wrist and forearm. However, Dr. Stoken identified an additional six percent of the right upper extremity as a result of loss of range of motion in claimant's right thumb. Dr. Paulson provided no measurements for range of motion of the right thumb. Both impairment ratings were offered pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Dr. Stoken's impairment rating appears to identify impairment permitted by the AMA Guides that was either not measured or not considered by Dr. Paulson. Dr. Stoken's impairment rating appears to be more comprehensive and consistent with the AMA Guides. Therefore, I find that Mr. Sensouk has proven by a preponderance of the evidence that he sustained a nine percent permanent impairment of the right arm as a result of the August 4, 2017 work injury.

Mr. Sensouk also asserts a claim for Second Injury Fund benefits. Given that the August 4, 2017 injury is stipulated to be a right arm injury, claimant has established a qualifying second injury for purposes of the Second Injury Fund. However, there is a dispute as to whether Mr. Sensouk proved a first qualifying injury.

Claimant points to an injury he sustained in July 2017 as the basis for his first qualifying injury. At trial, claimant testified that he experiences numbness in the left ring finger and over the top of the left hand. He also testified that his left hand grip is weaker than it was prior to his injury in July 2017. (Claimant's testimony)

Review of the medical records demonstrates that claimant was diagnosed with a nondisplaced spiral fracture of his left ring finger. (Joint Ex. 1, p. 3) While in surgery for his right arm injuries, the surgeon placed a splint on the left ring finger and that fracture healed with time. (Joint Ex. 2, p. 6; Joint Ex. 3, pp. 5, 10, 14; Joint Ex. 4, p. 3)

In her independent medical evaluation, Dr. Stoken records, "He states that he now has residual numbness in that finger." (Claimant's Ex. 1, p. 1) Dr. Stoken also noted, "He complains of pain in his left arm that he describes as aching, sharp, tender, burning, tiring, and numb." (Claimant's Ex. 1, p. 5) However, Dr. Stoken's diagnosis of

the condition was "Status post work injury on or about July 2017 with left fourth digit fracture." (Claimant's Ex. 1, p. 7)

Dr. Stoken identified loss of range of motion in the distal joints of the left ring finger. However, she identified no loss of range of motion in the metacarpophalangeal (MP) joint, or the joint connecting the left ring finger with the hand. Dr. Stoken identified no other objective pathology involving the hand. Instead, her diagnosis and impairment all relates to the left ring finger.

Dr. Paulson offers a similar diagnosis of the left ring finger fracture. He concurs with Dr. Stoken that any permanent impairment is limited to range of motion in the distal joints of the left ring finger. (Employer's Ex. A)

The Second Injury Fund obtained a records review and report from Dean K. Wampler, M.D. Dr. Wampler opined that claimant did not sustain any permanent impairment relative to the MP joint connecting the left ring finger to the left hand. (Second Injury Fund Ex. AA)

No physician has offered a diagnosis of injury to the left hand. No physician has offered permanent impairment relative to the left hand. Instead, all diagnoses and impairment are limited to the left ring finger. Notwithstanding claimant's testimony about numbness into his hand, I find that the situs of the injury and any permanent impairment are limited to the left ring finger and do not extend into the left hand.

CONCLUSIONS OF LAW

The parties stipulated that claimant sustained a work injury on August 4, 2017 and that the injury caused both temporary and permanent disability. (Hearing Report) Review of the parties' post-hearing briefs demonstrates that there is no dispute about the nature of claimant's August 4, 2017 work injury. It is confined to the right arm.

Claimant asserts only a claim for a right arm injury against the employer and the Second Injury Fund does not dispute this assertion. Therefore, I conclude that the award of permanent disability against the employer is limited to a scheduled member injury and should be compensated pursuant to Iowa Code section 85.34(2)(m).

Iowa Code section 85.34(2)(m) provides that an arm injury should be compensated based upon a 250-week schedule of benefits. Iowa Code section 85.34(2)(w) 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).

Having found that Mr. Sensouk proved he sustained a nine percent impairment of the right arm as a result of the August 4, 2017 work injury, I conclude that claimant is entitled to 22.5 weeks ($250 \times 9\% = 22.5$) of permanent partial disability benefits from Nationwide Office Cleaners. Iowa Code section 85.34(2)(m), (w).

Having concluded that claimant's work injury on August 4, 2017 is limited to a scheduled member injury, I must also consider his 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 355 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

Given the parties' stipulation that claimant sustained a compensable right arm injury on August 4, 2017 that caused permanent disability; I conclude that Mr. Sensouk has proven the second qualifying injury. As for an initial, or first qualifying injury, Mr. Sensouk asserted he sustained an injury to his left hand in July 2017. The Second Injury Fund contends that the July 2017 injury is limited to the left ring finger and is not a qualifying first injury. Iowa Code section 85.64 provides that a previous loss or injury must be established to "one hand, one arm, one foot, one leg, or one eye" before Second Injury Fund liability is triggered.

It is the anatomical situs of the permanent injury or impairment, which determines whether an injury is considered to a distal or more proximal body part. 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). In this instance, the anatomical situs of the injury and impairment determines whether the July 2017 injury is limited to the left ring finger or extends into the left hand for purposes of qualifying for Second Injury Fund benefits.

Having found that the situs of claimant's July 2017 injury and any resulting permanent impairment were limited to and located in the left ring finger, I conclude that the July 2017 injury is limited to the left ring finger and does not extend into the left hand. As such, I also conclude that claimant has not established an injury to a qualifying scheduled member for purposes of triggering Second Injury Fund liability. Iowa Code section 85.64.

Specifically, I conclude that claimant has not proven he sustained a qualifying first injury. Therefore, claimant has not proven Second Injury Fund liability. Claimant's Second Injury Fund claim will be dismissed without an award of benefits.

Finally, Mr. Sensouk seeks an award of costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Claimant has prevailed against the employer and insurance carrier by obtaining an award above the benefits voluntarily paid by the employer and insurance carrier. Therefore, I conclude that it is appropriate to assess claimant's filing fee of \$100.00 against the employer. 876 IAC 4.33(7).

ORDER

THEREFORE, IT IS ORDERED:

The employer and insurance carrier shall pay claimant twenty-two point five (22.5) weeks of permanent partial disability benefits commencing on February 2, 2018 at the stipulated weekly rate of three hundred fifty-seven and 02/100 dollars (\$357.02).

The employer and insurance carrier shall pay accrued weekly benefits in a lump sum together with interest 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, as required by Iowa Code section 85.30.


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.

The employer and insurance carrier shall reimburse claimant costs totaling one hundred and 00/100 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.

Claimant takes nothing from the Second Injury Fund of Iowa and his claim against the Second Injury Fund is dismissed.

Signed and filed this 20th day of February, 2019.


WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.