

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEITH HAISLIP, SR.,

Claimant,

vs.

NICHOLS ALUMINUM - DAVENPORT
n/k/a ALERIS INTERNATIONAL, INC.,

Employer,

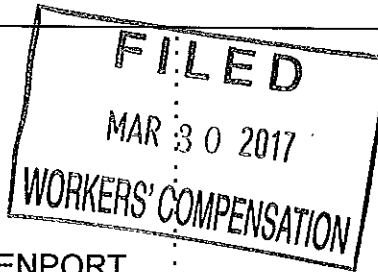
and

SENTRY CASUALTY CO.,

Insurance Carrier,

SECOND INJURY FUND OF IOWA,

Defendants.



File Nos. 5056132
5056133

ARBITRATION
DECISION

Head Note Nos.: 1803, 3202

STATEMENT OF THE CASE

Keith Haislip, Sr., claimant, filed a petition in arbitration seeking workers' compensation benefits from Nichols Aluminum – Davenport, n/k/a Aleris International, Inc., (hereinafter Aleris) and its insurer, Sentry Casualty Co., and the Second Injury Fund of Iowa (Fund) as a result of injuries he sustained on April 19, 2014 (File No 5056132) and September 17, 2015 (File No. 5056133) that arose out of and in the course of his employment. This case was heard in Davenport, Iowa, and fully submitted on March 15, 2017. The evidence in this case consists of the testimony of claimant. Claimant's Exhibit 1, Aleris and Sentry Casualty Co., Exhibits A – F and H, and the Fund's Exhibits AA – CC.

Claimant chose not to submit a brief. Aleris and the Fund submitted briefs.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties agreed claimant had been overpaid on rate in the amount of \$78.36 in File No. 5056132. (Hearing Report) During the arbitration hearing Aleris Inc. and Sentry Casualty agreed to pay claimant the cost of the independent medical examination (IME) by Marc Hines, M.D. (Exhibit. 1, page1)

ISSUES

FOR FILE NO. 5056132 (Left knee: Date of Injury April 19, 2014):

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

FOR FILE NO. 5056133 (Right knee: Date of Injury September 17, 2015)

1. Whether the alleged injury is a cause of permanent disability and, if so;
2. Whether the alleged disability is a scheduled member disability or extends to an unscheduled disability.
3. The extent of claimant's disability.
4. Whether the claimant has shown entitlement to benefits from the Fund and, if so:
5. The credit the Fund is entitled to receive and, if so;
6. Commencement date for Fund benefits, if any.

FINDINGS OF FACT

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

Keith Haislip, Sr., claimant was 53 years old at the time of the hearing. Claimant completed eighth grade. In 2010 claimant obtained his GED.

Claimant has work for Aleris for about 6 years. He is a millwright. As a millwright his primary functions are, "Installs, repairs, rebuilds, and/or maintains production equipment, maintains plant services and provides upkeep of building and grounds." (Ex. F, p. 1) He works full time, which includes 12-hour shifts. Some weeks he works 36 hours and some weeks are 48 hours. (Ex. BB, p. 29) As a member of the union his pay has increased since both of his injuries. Claimant intends to keep working for Aleris as a millwright.

Claimant testified that on April 19, 2014 he was carrying items at work when his foot caught; he tripped and felt a burning in his left knee. Claimant reported his injury and was seen by Camilla Fredrick, M.D. Claimant testified that he was provided conservative care such as ice and physical therapy.

He eventual was referred to Abdul Foad, M.D. An MRI was obtained which showed a torn meniscus. Dr. Foad drained claimant's knee and provided a cortisone injection. Claimant was still experiencing pain and returned to Dr. Foad. Claimant said that Dr. Foad took another look at the MRI and discovered a torn tendon. Claimant said that Dr. Foad did not think either the meniscus or tendon injuries required an operation. Claimant testified his left knee hurts walking up ladders.

On September 17, 2015, claimant was at work riding in a golf cart. While in the cart, claimant was almost run over by another vehicle. Claimant saw the vehicle about to hit him and he fled off his cart. He was hit in the back of the right knee. Claimant went to Quad City Occupational Health and saw Dr. Frederick on that day. (Ex. A, p. 17) Claimant was referred to Dr. Foad. Dr. Foad performed surgery on his right knee.

Claimant said that both Dr. Frederick and Dr. Foad returned him to work without restriction. Claimant testified that he has no feeling on a portion of his right knee and cannot kneel on his right knee. Claimant testified that his right knee pops a couple of times a week and that his left knee pops about once a month. He testified that he is slower climbing on ladders due to his knee injuries. He also said he wears a brace (compression sleeve) on both knees.

Claimant said that the last treatment he had for his right knee was in December 2015. He is taking no prescriptions or over-the-counter medication for his knees. He has no restrictions from any physician due to the injuries to his knees.

Claimant owns a race car and spends about 20 hours per week on repairing and rebuilding his racecar, including the engine, transmissions, body and other parts. (Ex. BB, p. 26) Claimant said he did everything but drive the race car. In his deposition, claimant testified that he stopped driving due to his left knee and the difficulty of climbing into and out of the race car. (Ex. BB, p. 25) Claimant is able to shovel his walk and driveway, as well as vacuum and shampoo the carpets. (Ex. BB, pp. 24, 25)

Claimant was self-employed from 2001 through 2009 operating a transmission repair shop. For about a year he was a shop supervisor in an auto-repair shop in Des Moines. Claimant was then a service manager in an auto shop in Davenport for two years. From 2008 through 2011 claimant was self-employed again operating J & K Truck & Trailer Repair. Claimant started to work for Aleris in October 2010. (Ex. BB, p. 29) (See Ex. CC, p. 38)

In his deposition, claimant said that he had difficulty at work when he had to climb ladders or stairs. (Ex. BB, p. 30) When claimant would have to repeatedly climb stairs at work his right knee hurts, not the left. (Tr. BB, p.30)

I find the testimony of the claimant credible as to the limitation of his right and left lower extremities. He candidly admitted that he was able to continue to work as a millwright and work on his race car. I found his description of pain, knees popping and difficulty with repetitive stair and ladder climbing to be consistent with his deposition and the medical evidence.

Claimant was seen by Dr. Frederick, on September 25, 2014 for left knee pain. Claimant reported that he was injured on April 19, 2014. (Ex. A, p. 2) Dr. Frederick's diagnosis was, "1. Tear in the Medial Meniscus, Knee Left (836.0) 2. Knee Strain, Left (844.9)." (Ex. A, p. 4) Claimant was allowed to work his regular duties. (Ex. A, p. 1) An MRI of October 6, 2014 found a tear in the posterior horn of the medial meniscus. (Ex. B, p. 1) On November 6, 2014, Dr. Foad wrote claimant "...[I]s three weeks status post aspiration and cortisone injection. He states he feels 98% better." (Ex. C, p. 1) Dr. Frederick found claimant at maximum medical improvement (MMI) on November 21 2014 and assigned a 2 percent lower extremity rating for the leg. (Ex. A, p. 11)

Claimant injured his right knee on September 17, 2015. He was diagnosed with right knee contusion and right knee strain and taken off work. (Ex. A, pp. 22, 24) On September 24, 2015, Dr. Frederick reviewed an MRI and diagnosed claimant with:

DIAGNOSIS:

1. Contusion of RT medial femoral condyle (bony)
2. Sprains RT biceps m [sic] hamstring
3. Tear of Medial Meniscus, Knee, Right
4. Effusion, Knee, Right

(Ex. A, p. 33) Claimant was placed on restricted work—sit down work.

On October 8, 2015, Dr. Foad offered claimant a right knee arthroscopy for a medial meniscal tear. (Ex. C, p. 2) Dr. Foad performed surgery on October 16, 2015. His postoperative diagnosis was:

1. Right knee complex tear of the posterior horn of the medial meniscus.
2. Right knee Grade II chondromalacia central ridge of patella.
3. Grade II and Grade III chondromalacia of the weightbearing surface of the medial compartment.

(Ex. C, p. 6) On December 17, 2015, Dr. Foad and Dr. Frederick found claimant at MMI and returned him to work without restrictions. (Ex. A, pp. 16, 19; Ex. C, p. 11)

On August 5, 2016, Dr. Hines performed an IME. Dr. Hine's impressions were:

The final diagnoses then are on the left meniscal tear along with tendinous tear and bony changes related to a work injury as previously described, the left knee injury having occurred on 04/19/2014 and clearly being described as a work-related injury by all examiners previously and work-related in my opinion. The patient has a medial meniscus tear, as well as bony and cartilaginous injury having occurred on 09/07/2015 in the right knee, requiring a medial meniscectomy, but with continued symptomatology which is more limiting, as described, and is described as work-related by all examiners and is work-related in my opinion.

(Ex. 1, p. 10) Using the AMA Guides to the Evaluations of Permanent Impairments, Fifth Edition, Table 15-5, page 529. Dr. Hines assigned a 7 percent whole person impairment rating for the left leg¹. He found that claimant had a 12 percent whole body impairment for the right knee. (See footnote 1) (Ex. 1, p. 10) Dr. Hines did not provide claimant any restrictions. He did recommend that claimant consider vocational rehabilitation given the likelihood of osteoarthritis in his knees. (Ex. 1, p. 11)

On September 29, 2016, Dr. Foad responded to a request from Aleris to evaluate the ratings of Dr. Frederick and Dr. Hines based upon a records review. (Ex. C, p. 12) It appears that he examined claimant as well. Dr. Foad agreed with Dr. Fredrick's rating of the right knee². (Ex. C, p. 14) He disagreed with Dr. Frederick's rating for the left knee as claimant did not have surgery and stated that he would argue that claimant had a zero impairment to the left knee. (Ex. C. p. 14)

Dr. Foad took issue with the ratings Dr. Hines provided. He noted that Dr. Hines mixed up the left and right knee and stated that as viewed by orthopedic surgeons' point of view claimant did not have "... [A] multi-ligamentous knee injury, but rather a meniscal tear that may or may not have been pre-existing combined with underlying pre-existing osteoarthritic knees that sustained a temporary exacerbation after a work-related injury." (Ex. C, p. 14) He was able to agree that a 2 percent lower extremity rating could be found for the left knee and also a two percent impairment rating for the right knee. (Ex. C, p. 15) Dr. Foad said that claimant's current complaints are consistent with progressive symptomatic osteoarthritis of his knees. (Ex. C, p. 16)

I find based upon Dr. Frederick and Dr. Foad claimant has a 2 percent impairment to the left lower extremity and 2 percent to the right lower extremity. Both injuries arose out of and in the course of his employment with Aleris.

¹ Dr. Hines apparently has confused the right and left knee in this section of the IME as it is the right knee that had surgery, not the left. Dr. Foad notes this mistake as well.

² I was unable to find the rating in the record and can by inference determine that it was a 2 percent to the lower extremity as the hearing report states Aleris paid 4.4 weeks of permanent disability benefits for this injury. [220 weeks x 2% = 4.4 weeks].

I do not find that either the right or left lower extremity injuries extend to the body as a whole. The claimant has failed to prove an industrial disability against Aleris.

I do find that claimant has proven a first and second injury for Fund liability purposes.

Claimant continues his work as a millwright for Aleris and is able to work 12-hour days. He has not been assigned any permanent restriction. He has very minor problems with his left knee. He gave up race car driving and his left knee will give out once or twice a month. He has a slight problem with his right knee which causes pain and swelling with repetitive stair climbing and some difficulty in kneeling. I find that claimant has a 5 percent loss of earning capacity.

RATIONAL AND CONCLUSIONS OF LAW

Aleris agreed that the September 17, 2015 injury caused a permanent injury. I found that claimant has proven a permanent injury for the April 19, 2014 left lower extremity. Dr. Fredrick, Dr. Hines and even to some extent, Dr. Foad agree that claimant has a permanent impairment to his left knee. The claimant had arthroscopic surgery on his right knee. He has proven a permanent impairment to his right lower extremity.

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).

Claimant has not proven that his functional loss is greater than the AMA Guides. He has a 2 percent loss of the lower extremity in both extremities. Aleris has paid these ratings and the parties agree that Aleris is entitled to credit for these payments.

Claimant has proven a 2 percent lower left extremity disability in File No. 5056132 and is entitled to 4.4 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(o). Commencement date for these benefits in November 21, 2014 at the weekly rate of \$699.08.

Claimant has proven a 2 percent lower right extremity disability in File No. 5056133 and is entitled to 4.4 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(o). Commencement date for these benefits is December 17, 2015 at the weekly rate of \$720.27.

Claimant has failed to prove his injuries have extended into the hip and therefore are an industrial disability. There is a brief mention in Dr. Hines' IME about problems with gait, but it does not distinguish between a gait problem caused by a knee, ankle or hip. The convincing medical evidence does not support an impairment in the hip caused by either work injury.

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).

I previously found that claimant has proven a qualifying first and second injury for Fund liability

For Fund liability the claimant's injury is deemed an impairment to the body as a whole, an industrial disability. 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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009).

Claimant is working full time in a physically demanding job, working 48 hours every other week.

Dr. Hines provided a 7 percent whole body impairment rating for the left lower extremity, using Table 17-5 of the AMA Guides. As claimant uses compression sleeves on his knee, it would qualify as an assistive device under the AMA Guides and Table 17-5 appears applicable. Using the Whole Persons Impairments chart, Table 17-3, page 527 of the AMA Guides, 7 percent converts to 17 percent lower extremity. A 12 percent whole body impairment converts to 30/31 percent using Table 17-3.

I find Dr. Foad's opinion as to the impairment ratings persuasive. He is an orthopedic surgeon. He performed the right knee arthroscopy on claimant. He provided more compelling evidence as to how he arrived at his ratings and why Dr. Hine's ratings were incorrect. Dr. Hines' IME mixes-up the leg injuries and finds impairment ratings far in excess of Dr. Foad and Dr. Frederick. Dr. Hines' ratings exceed claimant's functional ability that claimant testified to be able to perform.

At present, claimant continues to be employed. He requires no ongoing medical treatment or medications for control of his left and right lower extremities symptoms. He was assigned no permanent restrictions. I find claimant has proven he sustained 5 percent permanent impairment of the whole person as a result of this injury.

Ultimately, I find that claimant has proven only a minor loss of future earning capacity as a result of this injury. Considering the situs of claimant's injury, his need for surgical intervention, his age, the length of healing period, his permanent impairment, his lack of permanent work restrictions, his ability to return to work, as well as his post-injury demonstrated earnings, his motivation, and all other factors of industrial disability outlined by the Iowa Supreme Court, I find that claimant has proven a 5 percent loss of future earning capacity.

Claimant is entitled to 25 weeks of benefits from the fund at \$720.27 per week. Benefits from the Fund commence 4.4 weeks from December 17, 2015.

The Fund shall have a credit of 8.8 weeks. The Fund shall pay claimant 16.2 weeks of benefits. As I did not find the ratings from Dr. Hines persuasive and did not use them in assessing the extent of disability, the Fund does not receive credit based upon Dr. Hine's ratings.

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).

Claimant has not requested costs. Each party shall be responsible for their own costs, with the exception of Aleris payment of the IME costs of Dr. Hines.

ORDER

For File No 5056132 (Date of Injury 4/19/2014):

The defendant Aleris and Sentry Casualty Company shall pay claimant four point four (4.4) weeks of permanent partial disability commencing on November 21, 2014 at the weekly rate of six hundred ninety-nine and 08/100 dollars (\$699.08).

That defendants Aleris and Sentry Casualty Company are to be given credit for benefits previously paid.

For File No 5056133 (Date of Injury 9/17/2015):

The defendants Aleris and Sentry Casualty Company shall pay claimant four point four (4.4) weeks of permanent partial disability commencing on December 17, 2015 at the weekly rate of seven hundred twenty and 27/100 dollars (\$720.27).

That defendants Aleris and Sentry Casualty Company are to be given credit for benefits previously paid.

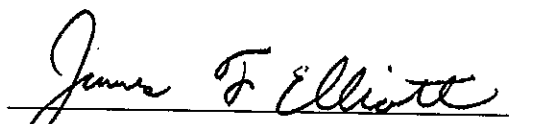
The Second Injury Fund of Iowa shall pay claimant sixteen point two (16.2) weeks of permanent partial disability commencing four point four (4.4) weeks from December 17, 2015 at the weekly rate of seven hundred twenty and 27/100 dollars (\$720.27).

For Both File Nos 5056132 and 5056133:

Defendants Aleris and Sentry Casualty Company shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2) for both files.

The parties shall pay their own costs as set forth in this decision.

Signed and filed this 30th day of March, 2017.


JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/kjw

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